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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 538

EVERETT D. GREEN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 27, 1956

CERTIORARI GRANTED NOVEMBER 19, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 589

EVERETT D. GREEN, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[1] [File endorsement omitted]

In United States District Court

ORDER INCARCERATING PETITIONER—Filed June 17, 1953
19-942

DISTRICT OF COLUMBIA,
County of Washington

To the Supt. of the Washington Asylum and Jail:

Receive into your custody the body of Everett D. Green herewith sent to you, being before me, Chris. J. Murphy, M. D., Acting Coroner of said County, and by a jury duly summoned at an inquest, held the 28th day of May, 1953 at the D. C. Morgue upon the body of Bettie Brown found guilty of the death of the said Bettie Brown according to the finding of the said inquest hereto attached, and safely keep in your said custody for further trial or until the further order of the Criminal Court of the District of Columbia.

Given under my hand and seal, this twenty-eighth day of May, 1953.

CHRIS J. MURPHY, M. D.,
Coroner.

Witness: Maurice F. Prestele, M. T. Zirkle.

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[2] [File endorsement omitted]

CORONER'S INQUISITION—Filed June 17, 1953

COUNTY OF WASHINGTON,
District of Columbia, set:

An inquisition taken at the D. C. Morgue in the County aforesaid, on the 28th day of May in the year of 1953 before me X. Chris J. Murphy, M. D., Acting Coroner of the said County, upon the view of the body of Betty Brown then and there lying dead, upon the oaths of F. J. Neff, Charles Campbell, J. J. Stuart, Edward Souder, M. T. Zirkle, M. F. Prestele, good and lawful men of the said County who, being sworn upon the Holy Evangelists of Almighty God, and charged to enquire when, where, how, and after what manner the said Betty Brown came to her death, do say upon their oaths that Betty Brown, white, female, 83 years, came

to her death as a result of pulmonary Edéma and acute trachea Bronchitis-Anoxia due to inhalation of hot irritating gases. (Other:) Chronic arteriosclerotic heart disease. She was pronounced dead at 8:10 a. m., May 26th, 1953.

We further state that she died in 1115 Massachusetts Avenue, N. W. as the result of a fire started by Everett E. Green, white, male, 63 years, who was found in the bath tub unconscious in the basement when firemen entered. He was arrested and appeared for the inquest.

We believe Everett E. Green responsible for the death of Bettie Brown and hold him for the action of the Grand Jury.

In Witness Whereof, as well as the aforesaid Coroner as the Jurors aforesaid, have to the Inquisition put their hands and seals on the day and year aforesaid and at the place aforesaid.

CHRIS J. MURPHY, M. D.,
Coroner (L.S.)

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[3] [File endorsement omitted]

In United States District Court for the District of Columbia
Holding a Criminal Term

Grand Jury Impanelled May 4, 1953. Sworn in on May 5, 1953

Criminal No. 1083-'53

Grand Jury No. 882-53

Arson

First Degree Murder

(22 D.C.C. 401, 2401)

THE UNITED STATES OF AMERICA

v.

EVERETT D. GREEN

INDICTMENT—Filed July 6, 1953

The Grand Jury charges:

On or about May 26, 1953, within the District of Columbia, Everett D. Green maliciously did burn, and cause to be

burned, a certain building known 1115 Massachusetts Avenue, Northwest, property of Gerald Freed.

SECOND COUNT:

On or about May 26, 1953, within the District of Columbia, Everett D. Green committed the offense of arson, that is to say, he maliciously did burn, and cause to be burned, a certain building known as 1115 Massachusetts Avenue, Northwest, property of Gerald Freed; and in perpetrating the offense of arson aforesaid, caused *Bettie Brown* to inhale certain gases, the inhalation of which resulted in her death, within the District of Columbia, on or about May 26, 1953.

(S.) LEO A. ROVER,
Attorney of the United States in and for the District of Columbia.

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[4] [File endorsement omitted]

In United States District Court for the District of Columbia

[Title omitted]

PLEA OF DEFENDANT—Filed July 13, 1953

On this 10th day of July, 1953, the defendant Everett D. Green, appearing in proper person and by his attorney H. Eugene Bryan, Esquire, being arraigned in open Court upon the indictment, the indictment being read to him, pleads Not Guilty thereto.

The defendant is remanded to the District of Columbia Jail.

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[5] [File endorsement omitted]

In United States District Court for the District of Columbia

VERDICT—Filed February 10, 1954

On this 10th day of February, 1954, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was

respited yesterday; whereupon the said jury, after hearing further of the evidence, and the instructions of the Court, Alternate Jurors Gladys Giles and Vernon Greene are discharged from further consideration in this case; and thereupon the jury upon their oath say that the defendant is guilty as indicted on count one and guilty of second degree murder on count two; whereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof says that the defendant is guilty as indicted on count one and guilty of second degree murder on count two.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District Jail.

By direction of CHARLES F. MCLAUGHLIN,
Presiding Judge,
Criminal Court #2.

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[6] [File endorsement omitted]

In United States District Court for the District of Columbia

Cr. No. 1083-53

UNITED STATES OF AMERICA

v.

EVERETT D. GREEN

On this 19th day of March, 1954 came the attorney for the government and the defendant appeared in person and by counsel, Eugene Bryan, Esquire.

JUDGMENT AND COMMITMENT—March 19, 1954

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Arson and First Degree Murder as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to

the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year to Three (3) years on count one; Five (5) years to Twenty (20) years on count two, to run concurrently with the sentence imposed on count one.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CHARLES F. MCLAUGHLIN,
United States District Judge.

---

[7] In United States District Court for the District of Columbia

Criminal No. 1083-53

UNITED STATES

vs.

EVERETT D. GREEN

ORDER AMENDING JUDGMENT AND COMMITMENT—March 31, 1954

It appearing to the Court that the second paragraph of the Judgment and Commitment entered herein on the 19th day of March, 1954, erroneously stated that the above named defendant had been found guilty of Arson and First Degree Murder, whereas it should have stated, Arson and Second Degree Murder.

It is this 31st day of March, 1954,

Ordered, that the said judgment and commitment be, and the same is hereby amended by striking that portion of the said judgment and commitment which appears in the second paragraph and reads as follows:

Arson and First Degree Murder

and in its place and stead the following is hereby substituted:

Arson and Second Degree Murder.

By the Court: CHARLES F. MCLAUGHLIN,
Judge.

[8] [File endorsement omitted]

In United States District Court for the District of Columbia
Washington, D. C.

[Title omitted]

NOTICE OF APPEAL—Filed April 9, 1954

Charge: Arson & Second Degree Murder, Appellant files Notice of Appeal, not being satisfied with the verdict of the jury in case No. 1083-53 United States vs Everett D. Green in finding him guilty of 2nd, Degree Murder and Arson in trial of Feb. 8th through Feb. 10th, 1954.

Subsequently due to the verdict of the jury, returned Feb. 10, 1954, the Honorable Judge Charles F. McLaughlin did on Mar. 19, 1954 sentence the Appellant to serve one to three years on Arson Charge and five to twenty years on Second Degree Murder charges to run concurrently.

[9] Appellant states that he has been deprived of his civil rights under the Sixth Amendment of the Constitution of the United States of America by the prosecution causing unnecessary delays in setting the first date of trial October 27-1953 before Judge James R. Kirkland and continued by the prosecution to and through the following dates, November 23, 1953, December 14, 1953, January 18, 1954 and finally to February 8th, 1954, when case was finally brought to trial before a jury presided over by Judge Charles F. McLaughlin. Appellant can prove that he did not set the house on fire and that the deceased Miss Betty Brown, eighty-three years old, did die a natural death about 12:30 a.m. May 26, 1953, about 6½ hours before the fire was discovered about 7 a.m. of the same date.

Respectfully submitted,

EVERETT D. GREEN.

[10] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,188

EVERETT D. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Mr. George Blow for appellant.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Thomas A. Flannery*, Assistant United States Attorney, were on the brief, for appellee.

Before WILBUR K. MILLER, PRETTYMAN and DANAHER, Circuit Judges. OPINION—decided January 20, 1955.

WILBUR K. MILLER, *Circuit Judge*: In the first count of an indictment, Everett Green was charged with arson.[1] In [11] the second, the grand jury alleged that the death of an elderly woman, Bettie Brown, resulted from the fire set by Green, and so accused him under § 22-2401, D. C. CODE (1951),[2] which defines the unpurposed killing of another in perpetrating arson as murder in the first degree.

---

[1] Section 22-401, D. C. CODE (1951), is as follows:

"Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building; or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meeting-house, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than one year nor more than ten years. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 820.)"

[2] Section 22-2401, D. C. CODE (1951), is as follows:

"Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice

In submitting the case to the jury under the second count, the trial judge instructed on both first and second degree murder. Found guilty of arson under the first count and of murder in the second degree under the second count, Green appeals only from the latter.

He says it was error to instruct the jury on second degree murder; that the verdict of guilty under that instruction shows the jury was unwilling to find him guilty of murder in [12] the first degree; that, therefore, had the erroneous second degree instruction not been given, he might well have been acquitted under the second count of the indictment. Thus, the sole question on this appeal is whether the trial judge erred to appellant's prejudice in instructing the jury on second degree murder.

Whether it was error to give that instruction depends on whether there was evidence to justify it; for we have held that under an indictment charging first degree murder done during the perpetration or attempted perpetration of one of the felonies enumerated in § 22-2401, the defendant may, if the evidence warrants it, be found guilty of the necessarily included offense of murder in the second degree.[3]

---

or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339, § 1.)"

[3] *Goodall* v. *United States*, 86 U. S. App. D. C. 148, 180 F. (2d) 397 (1950). We said at page 151:

"Although the indictment charged murder in the first degree, the appellant could have been found guilty thereunder of murder in the second degree had the evidence warranted it, since a defendant may be found guilty of any offense necessarily included in the crime charged in the indictment. Rule 31(c), Federal Rules of Criminal Procedure, 18 U.S.C.A. But an instruction on a lesser included offense should not be given unless there is evidence to justify it. Burcham v. United States, 1947, 82 U. S. App. D. C. 283, 163 F. 2d 761. All the

The first degree murder section of the District of Columbia Code, set forth at length in footnote 2, *supra*, enlarges the common law definition of that crime by adding thereto, *inter alia*, the unproposed killing of another in perpetrating arson. So, when the evidence at a trial tends to show the defendant committed arson, and that the fire was the sole [13] cause of the victim's death, the defendant is either guilty of murder in the first degree or he is not guilty.

In the present case, the only evidence as to the cause of the victim's death was that of Dr. Richard M. Rosenberg, Deputy Coroner of the District of Columbia, who performed an autopsy on the body of the victim, Bettie Brown. He testified in part as follows:

> "Q. Did you ascertain the cause of death of the deceased Bettie Brown?
>
> A. I did.
>
> "Q. Would you state that, Doctor?
>
> A. The cause of her death was pulmonary edema. That means an accumulation of fluid in the lungs due to acute trachea bronchitis.
>
> "Q. Will you explain that?
>
> A. That means inflammation of the trachea, which is the tube that leads from the mouth to the lungs and the bronchi, which are the tubes that lead from the trachea into the lungs themselves. This system of tubes was acutely inflamed, due to lack of oxygen, anoxia, being due to the inhalation of hot irritating gases.
>
> "Q. And the primary cause of death was the inhalation of hot irritating gases?
>
> A. That is correct."

Dr. Rosenberg amplified the foregoing rather extensively in his testimony given under cross-examination by appellant's counsel, a part of which we quote:

> "Q. Doctor, did you find anything else wrong with this woman in the course of your examination?

---

testimony as to what occurred at the drug store pointed to murder in the first degree and nothing else. . . ."

See also *Sparf and Haven* v. *United States*, 156 U. S. 51 (1895); *Stevenson* v. *United States*, 162 U. S. 313 (1896); *Davis* v. *United States*, 165 U. S. 373 (1897).

A. Yes.

"Q. What?

A. She was suffering from rather advanced heart disease. The large blood vessel going off the heart, the aorta, was inflamed and dilated, and the coronaries, which are the arteries in the heart itself, were sclerosed or handened. She had some degeneration of the liver and also of the kidneys, and she had generalized arteriosclerosis, which means that she had generalized harden- [14] ing of the arteries.

"Q. Now, Doctor, isn't it a fact that she could have died as a result of this heart condition?

A. In the instant case, no.

* * * * *

"This woman was 83 years of age, and anyone of that age is bound to have degenerative changes in their [*sic*] organs. However, the condition found in her lungs was due to an acute and recent episode, plus the fact that 14% carbon monoxid. was found in her blood, which is proof that she had inhaled these hot gases, which were due to the fire and therefore contained carbon monoxide.

* * * * *

"Q. Then it is on the basis of Doctor Young's report that you made this conclusion as to her death?

A. No. My conclusion as to her death was based on what I found in her lungs, to wit, pulmonary edema, inflammation of the trachea and bronchi, and that I believe was due to the inhalation of hot irritating gases, and the presence of the carbon monoxide indicated to me that at the time of the fire the woman was alive.

"Q. Well, now, it indicated to you that at the time of the fire she was alive?

A. Yes.

"Q. Is there any question in your mind about that?

A. No, sir.

"Q. Is it possible under any circumstances that she may have been dead at the time of the fire?

A. No, sir.

* * * * *

"Q. Doctor, isn't it possible that this woman could have inhaled an amount of this smoke or gas and that she then had a heart attack and died of the heart attack?

A. I interpret that to mean she died of a heart attack, per se, that is, of itself. The answer is no. It is a known fact that everybody that dies dies because of heart failure, but the cause of heart failure in this case was induced by the condition that was caused in her lungs.

[15] "Q. It is possible that she could have died as a result of heart failure, though not induced by this lung condition, isn't it?

A. Not in the instant case; no.

* * * * *

"The only thing that the carbon monoxide indicated to me was a positive proof that at the time of this fire the woman was alive, that she hadn't had a heart attack and died prior to the inhalation of the smoke and hot gases.

"Q. And this carbon monoxide that is in the blood, that convinces you that she died subsequent to the start of the fire?

A. That is right; that she was alive when the fire started."

The quoted testimony, which was undisputed, shows beyond peradventure that Bettie Brown's death was caused by the fire in the house in which her body was found. There was ample evidence to the effect that the appellant set the fire. We said in the *Goodall* case, 86 U. S. App. D. C. at 151, 180 F. (2d) at 400, "All the testimony as to what occurred at the drug store pointed to murder in the first degree and nothing else." And so we there held that the question whether there had been only second degree murder should not have been submitted to the jury, and that Goodall was treated more favorably than he deserved when it was submitted.[4]

[4] The question of the propriety of the second degree instruction arose in that case because Goodall, who was convicted of first degree murder, assigned as error the court's failure to tell the jury that, if they believed him guilty of the killing but were in doubt whether he had been proved guilty of first or second degree murder, they should find him guilty of the lesser crime.

In the present case, as in the *Goodall* case, all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else. Hence there [16] was no reason for a second degree instruction, and giving it was at least technically erroneous.[5]

It remains to determine whether the error requires reversal. The Government says there was no prejudice; that the trial judge in giving the second degree instruction treated Green more favorably than he deserved, just as in the *Goodall* case. That case is not parallel with this, because Goodall was convicted of murder in the first degree and of course could not have been prejudiced by the erroneous second degree instruction under which the jury refused to act.

Here, had the erroneous instruction under which he was convicted not been given, Green might have been found not guilty under the second count. In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial.

Reversed and remanded.

[17] PRETTYMAN, *Circuit Judge*, dissenting: I would affirm in this case. I agree with the Government's contention, as stated by the court, that even if the instruction was in error the trial judge in giving it "treated Green more favorably than he deserved, just as in the *Goodall* case." In the language of Rule 52(a) of the Criminal Rules, the error

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[5] There are, of course, cases in which the evidence warrants a second degree murder instruction under an indictment charging murder in the first degree done in perpetrating or attempting to perpetrate one of the other felonies listed in the statute. For example, in the recent case of *Kitchen* v. *United States*, No. 12,229, decided January 13, 1955, we upheld a conviction of murder in the second degree under an indictment which charged killing another during robbery. The evidence was such as to warrant the jury in finding, as it did, that although Kitchen killed the victim, he did not rob him.

"does not affect substantial rights" of the defendant and should "be disregarded."

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[18] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

MANDATE—February 23, 1955

THE UNITED STATES OF AMERICA
The President of the United States of America, ss:

To the honorable the Judges of the United States District Court for the District of Columbia, Greeting:

Whereas, lately in the United States District Court for the District of Columbia, before you or some of you, in a cause between The United States of America, plaintiff, and Everett D. Green, defendant, Criminal No. *1083-53*, wherein the judgment of the said District Court entered in said cause on the 19th day of March, 1954, is in the following words, viz:

"On this 19th day of March, 1954 came the attorney for the government and the defendant appeared in person and by counsel, Eugene Bryan, Esquire.

"IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Arson and First Degree Murder as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

"IT IS ADJUDGED that the defendant is guilty as charged and convicted.

"IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

> One (1) years to Three (3) years on count one; Five (5) years to Twenty (20) years on count two, to run concurrently with the sentence imposed on count one.

"IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CHARLES F. MCLAUGHLIN, *United States District Judge.*"

and wherein the following order of the said District Court was entered on the 31st day of March, 1954:

"It appearing to the Court that the second paragraph of the Judgment and Commitment entered herein on the 19th day of March, 1954, erroneously stated that the above named defendant had been found guilty of Arson and First Degree Murder, whereas it should have stated, Arson and Second Degree Murder.

"IT IS THIS 31st day of March, 1954,

"ORDERED, that the said judgment and commitment be, and the same is hereby amended by striking that portion of the said judgment and commitment which appears in the second paragraph and reads as follows:

[19] "Arson and First Degree Murder

and in its place and stead the following is hereby substituted:

"Arson and Second Degree Murder.

By the Court: CHARLES F. MCLAUGHLIN, *Judge.*"

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the District of Columbia Circuit by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears; [20] AND WHEREAS, in the term of October, in the year of our Lord one thousand nine hundred and fifty-four, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and the same is

hereby, remanded to the said District Court with directions to award a new trial.

January 20, 1955.

[21] YOU THEREFORE, ARE HEREBY COMMANDED that such further proceedings be had in said cause in conformity with the option and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the twenty-third day of February, in the year of our Lord one thousand nine hundred and fifty-five.

JOSEPH W. STEWART, *Clerk of the United States Court of Appeals for the District of Columbia Circuit.*

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[22] [File endorsement omitted]

In the United States District Court for the District of Columbia

[Title omitted]

MOTION TO DISMISS INDICTMENT—Filed April 8, 1955

Now come counsel for the defendant in the above-entitled cause and respectfully show unto the Court as follows:

First. That on the 6th day of July, 1953, a grand jury for the United States of America, impanelled in the District Court of the United States for the District of Columbia, holding a criminal term, returned and presented in said Court a bill of indictment, numbered 882-53, against the defendant, charging him with the offense of arson under D. C. Code, Title 22, § 401, and with the offense of felony-murder, which is murder in the first degree under D. C. Code, Title 22 § 2401.

Second. That this was a good and sufficient indictment.

Third. That on the 10th day of July, 1953, the defendant was arraigned and placed on trial in the said District Court of the United States for the District of Columbia, upon the charges of arson and of murder in the first degree as charged in said indictment #882-53.

[23] Fourth. That the said District Court of the United States for the District of Columbia had jurisdiction over this cause.

Fifth. That on the 10th day of February, 1954, the jury impanelled in said Court in said cause returned into Court a verdict in words as follows: "We, the jury, find the defendant Everett D. Green guilty of arson on count one. We find the defendant guilty of second degree murder on the second count." That said verdict was received in said cause and by the Court ordered filed and the jury discharged. On the 19th day of March, 1954, the Court then and there adjudged that the defendant was guilty of arson and of second degree murder and committed the defendant to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year to three years on Count 1; five to twenty years on Count 2, to run concurrently with the sentence imposed on Count 1.

Sixth. That the United States Court of Appeals for the District of Columbia Circuit on January 20, 1955, reversed the conviction of second degree murder and remanded this case for a new trial.

Seventh: That it now appears that the defendant will be retried on the greater offense of first degree felony murder.

[24] Wherefore the defendant, having been once in jeopardy for this offense, respectfully moves that the indictment be dismissed.

Dated: April 8, 1955.

GEORGE BLOW,
701 Union Trust Building
Washington, D. C.
CHARLES E. FORD,
116 Fifth Street, N. W.,
Washington, D. C.,
Attorneys for Defendant by
Court Appointment.

CERTIFICATE OF SERVICE—(Omitted in printing)

[25] [File endorsement omitted]

In United States District Court for the District of Columbia

Criminal No. 1083-53

Charge Arson; First Degree Murder

UNITED STATES

vs.

EVERETT D. GREEN, DEFENDANT

ORDER DENYING MOTION TO DISMISS—April 29, 1955

On this 29th day of April, 1955, came the attorney of the United States, the defendant in proper person and by his attorney, George Blow, Esquire, whereupon the defendant's motion to dismiss the indictment, coming on again to be heard, after argument by counsel, is by the Court denied. The defendant is remanded to the District of Columbia Jail.

By direction of

F. DICKINSON LETTS,
Presiding Judge, Criminal Court #2.

[1-2a] In the United States District Court for the District of Columbia

CRIMINAL ACTION NO. 1083-53

UNITED STATES OF AMERICA

v.

EVERETT D. GREEN, DEFENDANT

Transcript of Evidence

Washington, D. C., Monday, May 16, 1955.

Trial in the above-entitled cause was begun before the Honorable F. Dickinson Letts, a District Court Judge, and a jury at 10:00 o'clock a.m.

APPEARANCES:

Thomas Flannery, Esq., for the Government.
Charles E. Ford, Esq.,
George Blow, Esq., for the Defendant.

[3] COLLOQUY BETWEEN COURT AND COUNSEL

The COURT: Will counsel come to the bench, please.

(At the bench:)

The COURT: This case has been tried and is back from the Court of Appeals.

Mr. FORD: Yes.

The COURT: I thought I recognized it.

Mr. FORD: I may say, Your Honor, that the defendant noted the appeal. After the case had gone to the appellate court, the appellate court assigned Mr. Blow to argue the appeal, which he did. Then the case came back, and we are both appointed by the court in this case.

The COURT: Yes.

Well, now, what is the charge in the second count; is it now first degree?

Mr. FLANNERY: First degree, Your Honor.

It is a most unusual situation. The Court of Appeals reversed this second degree conviction, because they said that the evidence showed that he was guilty of first degree murder or nothing and that when the first trial judge instructed on second degree murder in the first trial, the defendant was prejudiced by that, because he was entitled to have his guilt determined on first degree only. So now it would appear that he has to be tried on first degree or nothing.

The COURT: They ruled out second degree?

[4] Mr. FLANNERY: Yes. They said the evidence in the first trial didn't show second degree.

The COURT: Is that the way you remember it?

Mr. FORD: Yes, Your Honor.

Mr. BLOW: Your Honor, I would like the record to show that we made a motion in this case to dismiss the indictment on the ground that——

The COURT: The record does show that.

Mr. BLOW: And we would like to reserve that question, of course, Your Honor.

The COURT: Of course, you have an exception to that.

Mr. FORD: Yes.

The COURT: So the record is clear on that. You presented your motion and it was denied. The record reveals that.

Mr. FORD: The Court may be faced with this, which we

consider a serious matter, if the defendant takes the stand in this trial now, whether or not the Government can ask him if he is the same person who was convicted of the arson in this case. You see, he was convicted of arson in this case on these facts at this place.

The COURT: Does that arson verdict stand or not?

Mr. BLOW: The arson verdict was not appealed.

Mr. FLANNERY: It was not appealed.

The COURT: So that stands. So the only trial here is on [5-9] the second count?

Mr. FLANNERY: Yes, sir.

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[10-18] VOIR DIRE EXAMINATION

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[19-45] The COURT: What do you say?

Prospective Juror WEBER: I will serve if I am chosen.

The COURT: Then there will be no reluctance on your part in finding him guilty, which will require the death penalty, if the facts and circumstances indicate that you should do so, when you understand the law?

Prospective Juror WEBER: Yes, sir.

The COURT: Very well, all right.

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[46] JOHN MALINAK was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. FLANNERY:

Q. Will you please state your name?

A. John Malinak.

[47] Q. You are a member of the Fire Department, are you not?

A. Yes, sir.

Q. On May 26, 1953, were you employed by the Fire Department?

A. Yes, sir.

Q. What firehouse, what part of the Fire Department did you work?

A. I was with Truck 3.

Q. On that date, in the course of your duties, did you have occasion to respond to 1115 Massachusetts Avenue, Northwest?

A. Yes, sir.

Q. Is that in the District of Columbia?

A. Yes, sir.

Q. What time did you respond there?

A. It was approximately 20 minutes of 8:00 a. m.

Q. When you arrived on the scene, what did you see?

A. Well, when I arrived at the scene, the truck pulled up in front of the house and smoke was coming out from underneath the eaves near the roof, which indicated that the house was full of smoke.

Mr. FORD: Wait a minute. May that part, his opinion, go out?

The COURT: Yes, the latter part of the answer may go [48] out. Just relate facts.

By Mr. FLANNERY:

Q. You saw smoke coming out from under the eaves?

A. Yes.

Mr. FORD: But he left out the part also of the eaves of the roof.

By Mr. FLANNERY:

Q. What did you say?

A. I said eaves of the roof.

Q. What else did you see?

A. Well, engine companies were waiting to get a line into the house, and we worked with the engine company.

Q. Not what we did; what you did.

A. Well, that particular day I did work with the engine company, being assigned a certain tool which was used to force doors open if there isn't any other way of getting in.

Q. What did you do?

A. Well, I forced the front door open in the basement and went in with the hose line of Engine Company No. 16.

Q. Will you describe how you forced the door open?

A. Well, using this tool, what we call a claw tool, I butted the door in a number of times, forcing it open.

Q. Did you ascertain whether or not that door had been locked?

A. Yes, sir. I tried it first, before I started pounding on it.

[49] Q. And it had been locked?

A. Yes, sir.

Q. Then, after you forced the basement door, what did you do then?

A. Went in with the hose line, more or less feeling our way in, and working in towards the building, in towards the rear of it, I shopped, oh, at a fire up against the wall, oh, about 10 feet in from the door, and played water on that fire and put it out, and working again towards the rear of the building, stopped at another fire up against the same wall, oh, approximately another 15 or 20 feet. After putting that out is when I started ventilating; opening up windows and doors.

Q. Was there smoke in the basement when you first went in?

A. Yes, sir. I had to put on a mask to get in.

Q. You put on a mask?

A. Yes, sir.

Q. You say you started ventilating doors and windows. Will you describe what you did in that regard?

A. Well, the first door I run into is opposite that second fire in the rear of the floor, and that opened into a bathroom, and as I opened that door, I seen a man laying in the tub face down. I noticed there was a couple inches of water in the tub. I held my hand under his head and called for help [50] to help carry him out. And the squad responded to my call and we carried him out through the basement door in the front of the building and laid him out on the lawn.

Q. Who was that man?

A. That was Mr. Green, as I found out later.

The Court: Is he here today?

The Witness: Yes, sir.

By Mr. Flannery:

Q. Where is he today?

A. That is the defendant right in front of me (indicating).

Mr. FLANNERY: May the record indicate, Your Honor, that this witness identified the defendant?

The COURT: The record may so show.

By Mr. FLANNERY:

Q. Did you open any other doors or windows in the place?

A. As I recollect, I opened a window in the bathroom. It didn't seem to be locked. It more or less just slid up a little easy like.

Q. That was the window in the bathroom where you found this defendant?

A. Yes, sir.

Q. Did you do anything else in connection with this fire? Did you have occasion to go back in the basement at all? [51-53] A. Yes, sir, I was in that basement a number of times, and on one of those occasions in going out through that front basement door, I more or less smelled and heard a slight hiss, I believe, of escaping gas, and turning around, I noticed the plug taken out of the pipe leading into the gas meter, from which gas was escaping. Further noticing, I looked at the meter, and on top of the meter was this one plug; it seemed like it come out of that one opening in that pipe, and I replaced it.

Mr. FORD: Your Honor, may we object to the plug, seemed like it came out?

The COURT: Yes. That part of the answer stating that it seemed like something may go out. Just tell what you did and what you saw.

By Mr. FLANNERY: What did you do?

A. This plug laying on top of the meter—I just, well, more or less tried it on for size into this opening in the pipe, and it fitted right in, just screwed it back in.

Q. And it stopped the gas from escaping when you put it back on?

A. Yes, sir.

Mr. FLANNERY: I believe that is all of this witness.

CROSS-EXAMINATION:

By Mr. FORD:

[54] Q. I got you. So that as you jumped off the engine and got into the building, just before you went in through the door, you put the gas mask on?

A. Just before I entered the building.

Q. That is what I mean.

A. After it was broken in.

Q. Then you crashed in the door; is that right?

A. That is right.

Q. Then there came a time, as I understood you to say, when you went into the bathroom; right?

A. Yes, sir.

Q. Now the bathroom that you went into is on that same floor, the basement floor?

A. Yes, it was.

Q. And that is about how far back did you have to travel? Now assuming that you are coming in the front door, say, we are on the outside now (indicating), and you are ready to go into that building——

A. Yes, sir.

Q. —you crash through the door. Then how far back did you have to go before you got to a point where you could go in the bathroom?

A. I should say about 35 feet, 40.

Q. Then that would be to your right, would it, as you are coming in and facing the rear of the building?

[55] A. Well, the fires were on the right of the wall.

Q. Yes, but I am asking you where the entrance is to the bathroom.

A. That was on my left, opposite that second fire.

Q. To your left?

A. Yes, sir.

Q. Was the bathroom door open or did you have to force that open? Did you have a problem there?

A. No, sir. It was closed, but it was not locked. It was open.

Q. So it was closed, then. All you had to do was push on it and it opened?

A. That is right.

Q. And you didn't have to do any either a knocking or a crashing it down, but just manually, with your hands, you pushed the door open?

A. Turned the knob and opened it.

Q. Turned the knob and opened it?

A. That is right.

Q. Now at this time, when you went into the bathroom, were you by yourself or was there one of your comrade firemen with you?

A. No, I was by myself.

Q. And there you saw a bathtub, right?

A. Yes, sir.

[56] Q. As I understood you to say, you saw Mr. Green in the bathtub laying face down?

A. That is right, sir.

Q. Correct?

A. Yes, sir.

Q. And that you saw some water in the bathtub?

A. I did, sir.

Q. About how much water, would you say? I don't mean the gallonage; I mean by inches or feet.

A. I should say two or three inches at the most.

Q. And then what did you do when you saw the condition?

A. As I seen him laying on his stomach, more or less, I just put my hand underneath his head and kept it up above the water and yelled for help.

Q. Then, as you yelled for help, a fireman came to help you?

A. The squad came in, yes, sir. They responded on the scene.

Q. Is that what we know as the rescue squad?

A. The rescue squad, yes, sir.

Q. And that would be composed of several firemen?

A. Yes, sir.

Q. As they responded to your call, what did they do?

A. They all carried him out. I don't know just how many of us were there present.

[57] Q. There was more than one; correct?

A. Yes, sir; carried him out the front door of the basement.

Q. Did you see some blood on him?

A. Well, as I turned him over to carry him out the door, I noticed the front of his shirt was covered with blood.

Q. I wonder if you could give us a little more detail as to what you mean when you say covered with blood?

A. It was more or less like somebody would be laying in a pool of blood, and it was just covered with blood, is the only way I can describe it.

Q. So that there was a whole lot of blood; right?

A. Well, I should think there was.

Q. I mean, that is a fair statement of what you saw; right?

A. Yes, sir.

Q. Then did you see blood in the water?

A. That I did. The water seemed like it was diluted with blood.

Q. And would you say there was quite a bit of blood in the water?

A. As far as I can recollect, it didn't seem like there was too much, but you could see it was diluted with blood.

Q. Would you say there was a good amount of blood in the water?

[58-60] A. I just don't know how much a good amount would be.

Q. Well, I don't think you measured it, but I do want to get an idea, like if it would be a little bit of blood, like if I pricked my finger and a little blood would come out or if I took a knife and cut myself deep, then maybe a lot of blood would come out my shirt. That is what I am trying to show.

A. I don't believe there was too much. It was more or less on the thin side of being diluted with blood and water.

Q. However, I think you said that the shirt was full of blood?

A. Well, it was bloody, but that wouldn't be actually blood. It would be diluted with water. It was red.

Q. Put it this way: Describe it by its color. Was the shirt full of red color?

A. Yes, it was.

Q. There was a window in that bathroom, too, wasn't there?

A. Yes, sir.

Q. Was that window open or closed when you went in?

A. As far as I can recollect, it was closed and I opened it, but it went up real easy. It didn't seem like it was locked.

Q. And you found Mr. Green unconscious, didn't you?

A. Actually, I didn't know whether he was conscious or unconscious.

. . . . . .

[61] Q. Now let me ask you this. When you were on the stand down there, were asked that question either by the coroner—yes, by the coroner—were you asked this question: "Was he conscious?"

A. I was.

Q. Right?

A. Yes, sir.

Q. And that question was asked you down there; right?

A. Yes, sir.

Q. And then you answered: "No, he was unconscious as far as I knew. At least he seemed like he was. I yelled for help and I really don't know who I got to help me, but three or four of us went out the same way and carried him out through the same way we came in, through the door in the basement. I noticed he had a cut on the back of his neck. He was laying on his stomach in the tub and as we lifted him up, his undershirt was bloody right over his stomach."

[62-63] Now I have read the full answer you gave, have I not?

A. Yes.

Q. And I haven't put anything in it or taken anything out; right?

A. Yes, sir.

Q. So now that is the way you testified down at the morgue; right?

A. Yes, sir.

Q. So now I want to ask you, isn't it your recollection that he was unconscious?

A. Well, there was no way of telling if he was unconscious or not. Here I don't state that he was. It seemed like he was unconscious.

Q. Did you state there he wasn't unconscious?

A. I did say no, he was unconscious as far as I knew.

Q. Right. Now that is the end of the sentence; right; there is a period there?

A. That is right, sir.

Q. What would you say now, that as far as you know, he was unconscious?

A. That is right.

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[64] Q. Where else did you see blood, if any, in addition to there being blood over his stomach, blood over the upper part of his body and blood on his neck? Where, in addition, did you see blood on the defendant?

A. That is all, sir.

Q. Those three places?

A. Yes, sir.

Q. Then you and the members of the rescue squad carried him out through the basement door——

A. Yes.

Q. —to the outside; right?

A. Yes.

[65-69] Q. When you got on the outside carrying him, what did you do?

A. We laid him on the lawn, and that is the last I seen of him that day.

Q. So you laid him on the lawn and you left to take care of something else to do with the fire?

A. Yes.

Q. And that was the last time you had seen the defendant; is that right?

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[70] Dr. RICHARD ROSENBERG, was called as a witness by the Government, and after being duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION:

By Mr. FLANNERY:

Q. Doctor, please state your name.

A. Richard M. Rosenberg.

Q. You are a deputy coroner, are you not, sir, at the District of Columbia Morgue?

A. Yes, sir, I am.

Q. On May 26, 1953, were you also a deputy coroner at the District of Columbia Morgue?

A. Yes.

* * * * *

[71] Q. Doctor, on May 16, 1953, did you have occasion to perform an autopsy on one Betty Brown?

A. I did.

Q. At what time did you perform the autopsy?

A. 1:00 P. M.

Q. Will you please relate what the autopsy revealed?

A. The autopsy revealed that the lungs were markedly congested and markedly edematous. By edema is meant a collection of fluid. The trachea and bronchi—trachea is a tube that leads from the mouth into the chest cavity, approximating the lungs; it branches off to form the bronchial tubes on either side—were markedly inflammed throughout.

Q. What did that indicate to you, the fact that the trachea and the bronchi were markedly inflammed throughout?

A. The tissues had been subjected to irritation.

Q. All right, go ahead.

A. She also was an aged woman, 83 years of age. Her [72-89] heart was normal in size but was markedly degenerated; by that is meant that it was diseased, and there was positive fat in the covering of the heart. The large vessel going off the top of the heart was dilated and inflammed and the coronary arteries, which are vessels that supply the heart itself, were hardened.

Q. All right, what else did you find?

A. There was a generalized arteriosclerosis, which means that all her blood vessels were sclerosed or hardened. There was some congestion or edema in the brain. The remaining organs showed degenerative changes, compatible with her age but not remarkable.

Q. Did you determine what the cause of death was in this case?

A. Yes. The cause of death was pulmonary edema and an acute tracheobronchitis and anoxia, which means lack of oxygen due to the inhalation of hot irritating gases. As concomitant or accompanying causes, I have chronic arteriosclerotic heart disease.

Q. In your opinion, was the deceased in this case alive at the time she inhaled the hot gases that you speak of?

A. Yes.

Q. In your opinion, did she die as a result of inhaling the hot gases that you have spoken of?

A. Yes.

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[90] JAMES H. SHIMP, was recalled as a witness by the Government, and having previously been duly sworn, was examined and testified further as follows:

DIRECT-EXAMINATION (resumed).

(The reporter read the last two questions propounded to this witness and the answers thereto.)

By Mr. FLANNERY:

[91] Q. Unless you need to refer to that to refresh your recollection, you don't have to use them, but I will ask you this. What were the results of your chemical analysis; what did you find?

A. I found that the blood was 14 percent saturated with carbon monoxide.

Q. 14 percent saturated with carbon monoxide?

A. That is right.

[92] CROSS EXAMINATION.

By Mr. BLOW:

Q. Mr. Shimp, when you examined this blood, that was one day old, was it not?

A. Yes, sir.

Q. Mr. Shimp, are you familiar with a book by Dr. Louis Goodman and Dr. Alfred Gilman, of Yale University, entitled The Pharmacological Basis of Therapeutics?

A. No, I am not.

Q. Those gentlemen are professors of medicine at Yale University. At Page 696 of this book, they describe the symptoms of carbon monoxide poisoning. You have stated, I believe, that you found or that a result of your analysis indicated that the blood was 14 percent saturated with carbon monoxide.

A. That is true.

Q. If I may read from this text——

Mr. FLANNERY: I would object to counsel reading from a text.

Mr. BLOW: May I give the witness this book and ask him to read from the text, Your Honor?

The COURT: He said he doesn't know anything about it.

Mr. BLOW: May I ask him to take a look at the book, Your Honor?

[93] Mr. FLANNERY: I object to it.

The COURT: For what purpose?

Mr. BLOW: The purpose, Your Honor, is to show that 14 percent carbon monoxide in blood is of absolutely no consequence at all, that unless there is 70 or 80 percent——

The COURT: You can ask him for his opinion, but you can't introduce the opinion of others by asking him.

Mr. BLOW: Yes, Your Honor.

By Mr. BLOW:

Q. In your opinion, Mr. Shimp, would 14 percent carbon monoxide in the blood have any serious effects?

A. I am not qualified to speak on that. That is for a doctor to say.

Q. Have you ever examined anyone who had 70 to 80 percent carbon monoxide saturdation?

A. Yes, I have.

Q. Would finding 70 or 80 percent carbon monoxide lead you to conclude that they had died from carbon monoxide poisoning?

A. That is up to the morgue doctor, the doctor in charge of the case that made that conclusion.

Q. But 14 percent is a very low percentage as compared to the percentages that you have found in persons whose blood you have examined?

A. That is true.

[94] Dr. RICHARD ROSENBERG, was recalled as a witness by the Government, and having previously been duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION.

By Mr. FLANNERY:

Q. Doctor, are you familiar with the results of the chemical analysis of the blood of Betty Brown in this case?

A. Yes.

Q. Are you familiar with the fact that the chemist found 14 percent of carbon monoxide in the blood?

A. Yes, sir.

Q. Does that indicate anything to you in this case, Doctor?

A. She had to be alive in order to inhale it, and it would be a factor in her death, because carbon monoxide is a [95] lethal gas in some instances, even in small amounts.

[96] CROSS EXAMINATION.

By Mr. BLOW:

[97] Q. I ask you what the customary symptoms are when a person has from zero to 10 percent saturation?

A. Ordinarily, they are very mild and may be absent.

[98] Q. May I ask you what the symptoms would be with those where that saturation is 10 to 20 percent?

A. They may be absent and still mild.

Q. May I ask you what they would be with a saturation of 20 to 30 percent?

A. Ordinarily, the individual becomes conscious something is amiss, indicated by headache, nausea, sometimes vomiting, weakness, muscular weakness, particularly in the legs. However, these symptoms may not be present; there may be none whatever.

Q. May I ask you what symptoms would be evident from 30 to 40 percent saturation?

A. I am afraid I will have to stop on that. I am not sure.

Q. What would the symptoms be, say, from 70 to 80 percent carbon monoxide saturation?

A. That is the maximum amount that has ever been found, and the symptoms would be very marked, unconsciousness, heart and blood pressure failure and death.

Q. That is, between 70 and 80 percent carbon monoxide saturation?

A. That is right.

Q. Doctor, I believe you have had occasion to do many autopsies in the last 20 years?

A. Yes, sir.

[99] Q. And during an autopsy, it is my understanding that you examine all of the organs of the body to see whether or not they are healthy or diseased?

A. That is right.

Q. Did you make such an examination of all the organs of the body of Miss Betty Brown?

A. All except the brain—no, I take that back—yes, all.

Q. With regard to the brain, what sort of an examination, may I ask?

A. Sections and examined—section, that means cut and examine.

Q. When was this done, Doctor?

A. The day the autopsy was done.

Q. Correct me if I am wrong, but it is my understanding that there may on occasion be a hardening of the arteries in the brain, there may be arteriosclerosis in the brain?

A. That is right.

Q. That there may be a rupture there?

A. Yes.

Q. And that in that event, it is impossible to determine that question until, oh, one or two months after death; is that correct or not?

A. No, I am afraid not. If there is a rupture of a vessel in the head or the brain, that would entail hemorrhage, [100] and that would be readily visible to the examiner.

Q. However, there is a test whereby the brain is preserved after death for some time in order to be perfectly sure there was no such rupture even in small parts of the brain?

A. I don't know the situation where there would be a rupture in a vessel of a living person without the evidence being readily available to the examiner.

Q. What condition did you find in Miss Brown's brain?

A. It was congested and edematous. By congested is meant that all the vessels, the myriad of vessels that form the network over and about the brain, were gorged; that is the congestion. There were also tiny hemorrhages through the brain substance called pinpoints or punctate, both of which are indicative of marked congestion. The

other was the presence of fluid, an abnormal amount of fluid, which is described by the word edema.

Q. Would it be possible for a person whose brain was in that condition to have a stroke, what we know of as a stroke?

A. What is known as a stroke is the rupture of a blood vessel in the brain.

Q. Would that be a likely occurrence in a person 83 years old with a brain condition as you have described?

A. It could have happened; I mean, she could have had a stroke at sometime had she lived.

[fol. 101] Q. What other organs of the body did you examine? Did you examine the liver?

A. The lungs, heart, liver, spleen, pancreas, stomach, intestines and kidneys.

Q. Exactly what, may I ask, did you find when you examined the kidneys?

A. They were congested and fibrotic. The word fibrotic means that the normal tissue that comprised the kidneys had been supplanted by a baser type of tissue fibrous in nature. In other words, normally, in a normal kidney, the resilience is of a certain degree which one learns from experience, and a kidney that is fibrotic is much tougher, harder, and you can tell it and feel it when you cut it and certainly when it is examined microscopically.

Q. Doctor, would you call a kidney in that condition diseased?

A. Yes, in any deviation from the normal.

Q. Would you say that condition was a chronic condition——

A. Yes.

Q. —or an acute condition?

A. No, no, chronic.

Q. Could it in a person 83 years of age sometime result in death?

A. I am afraid I don't understand your question, sir.

[102] Q. May I rephrase it: Were this condition to be undiagnosed and unattended in a woman of these years, would it be possible for that condition to be the cause of her death, leaving out any question of a fire?

A. As I understand it, the question is, had this woman gone on to live, would there come a time or could there

have come a time when this kidney would have been sufficiently bad to generate conditions in her to bring on her death, to cause her death; is that it?

Q. Yes, sir.

A. The answer is yes.

Q. Doctor, did you find anything wrong with her liver?

A. All her organs were about the same. They were all degenerated, fibrotic, and the vessels were hardened.

Q. And you would call the liver diseased as well as the kidneys?

A. Yes. The liver was swollen, congested and fibrotic, and the same condition existed there as existed in the kidneys, congested and fibrotic.

Q. Doctor, isn't it a fact that a very serious heart condition and a diseased kidney, a diseased condition in the kidneys, are often found together?

A. Yes.

Q. That they often appear at the same time in a person of that age

[103] A. Yes, very frequently.

Q. Doctor, when you examined the heart, would you mind repeating what you found as to the heart condition?

A. The heart was normal in size but markedly degenerated, and there was a large deposit of fat in the epicardium. The heart was normal in size, which is a little unusual, because most of the time in aged people there is a tendency toward some enlargement of the heart. However, that wasn't true. However, it was markedly degenerated, and by that is meant again the fibrous tissue had invaded the heart and supplanted normal muscle tissue, and in addition to that the coronaries, which are a system of blood vessels that encircle the heart at the top—somebody thought it resembled a crown; that is why it is called the coronary crown—and from the top the vessels go down, somewhat like fingers, to supply the heart muscle. Now that system of vessels were hardened or sclerosed.

Q. You would also describe that condition, then, as a condition of a diseased heart?

A. Yes, sir, markedly diseased.

Q. Markedly diseased?

A. Yes, sir.

Q. And you would say that these things that had been happening to her heart were in a fairly advanced stage?

A. That is right.

[104] Q. When you examined her?

A. That is right.

Q. Doctor, please correct me if I am wrong, but I understood you to say that the cause of death, the chief cause of death, was pulmonary edema?

A. That is right.

Q. That a contributing cause of death was the chronic heart disease?

A. I said pulmonary edema, which is the formation of fluid, and an acute tracheobronchitis—anoxia, which is oxygen deprivation due to the inhalation of hot irritating gases. A contributing factor was this chronic arteriosclerotic heart disease.

Q. Nevertheless, if I may refresh your memory, I believe at the coroner's inquest—and you there testified, did you not, Doctor?

A. I don't recall.

Q. —you said that the primary cause of death was this lung condition.

A. That is right.

Q. That would be the pulmonary edema, would it not?

A. Oh, no; the three, at least the pulmonary edema and the trachea and bronchi are part of the lungs, too.

Q. But mere inflammation of the trachea and bronchi would not cause death by itself?

[105] A. Oh, yes, it would; yes, it would.

Q. Nevertheless, you would describe and you have said that by lung condition, you meant the pulmonary edema.

A. The primary factor was the irritation of the trachea and bronchi, and they were the ones that set up the pulmonary edema.

Q. Doctor, may I ask you this question: Is not one of the many, many causes of pulmonary edema a so-called, left-side heart attack? I don't know the formal medical term. Is not one other——

A. Heart failure, yes.

Q. Heart failure?

A. Yes.

Q. Heart failure is a cause of pulmonary——

A. Yes, sir.

Q. Is not pulmonary edema often found in people who have hypertension?

A. Not because of the hypertension itself, but the hypertension eventually causes heart failure, and that in turn will cause edema in many places, such as swollen ankles and fluid accumulation in the lungs.

Q. Could not pulmonary edema follow severe shock?

A. Of course, the answer is yes, if I may qualify it.

Q. Yes.

A. It would depend on the degree of shock and how long [106] it lasted. Any shock that would persist for some time, particularly in an individual who may have some heart condition, would very likely produce pulmonary edema.

Q. What I am getting to, Doctor, is that the condition known as pulmonary edema is very oftentimes in persons with heart disease of some or many kinds and whose hearts stop, in other words, who have a heart failure.

A. Yes, pulmonary edema is a very frequent accompaniment of heart failure, as a matter of fact, most of the time.

Mr. Blow: That is all I have.

Redirect Examination.

By Mr. Flannery:

Q. Doctor, the pulmonary edema in this case, the case of Betty Brown, was caused by what, in your opinion?

A. Tracheobronchitis.

Q. Which was caused by what, in your opinion?

A. Inhalation of hot gases.

Q. In this particular case, talking about the case of Betty Brown, did she die from kidney trouble?

A. No, sir.

Q. Did she die from liver trouble?

A. No, sir.

Q. Did she die because of her markedly diseased heart?

A. That was a contributing factor. Had this woman been younger and all her organs in good shape and *had* she been [107-184] subjected to this thing, there is a possibility she may have survived. It is not a likely one, but it is within the realm of possibility, it could have happened. However,

what happened to her, the inflammation of her lung tissue, on top of the fact that she had a badly diseased heart, and her age, was enough to bring about her death.

Q. A younger person might have survived this fire?

A. That is a possibility.

Mr. FLANNERY: All right, that is all.

The COURT: Do you have anything further, Mr. Blow?

Mr. BLOW: I would just like to ask Dr. Rosenberg if he in his examination found any burns on the body.

The WITNESS: No, sir.

RECROSS EXAMINATION.

By Mr. BLOW:

Q. Did you examine her clothing?

A. All she had on was a nightgown and an undershirt, and I made a note, there was no evidence of fire damage to the clothing or body.

Mr. BLOW: Thank you, Doctor.

Mr. FLANNERY: That is all I have.

* * * * *

[185-190] WARREN C. KELLY, was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION.

By Mr. FLANNERY:

Q. Will you state your name, please?

A. Warren C. Kelly.

Q. You are a member of the Fire Department, are you not, sir?

A. Yes, sir.

Q. What is your position with the Fire Department?

A. I am a fire inspector assigned to the fire investigations section of the Fire Marshal's office.

Q. On May 26, 1953, were you so assigned in the Fire Department?

A. Yes, sir, I was.

Q. What is the nature of your duties?

A. To investigate fires to determine the origin and extent of the fires, the cause of the fires and the damage to the property done by fires.

* * * * *

[191] Q. Now, Inspector Kelly, directing your attention to May 26, 1953, you were a member of the Fire Department on that date, were you not?

A. Yes, sir.

Q. And detailed to the same type of work that you have testified that you are now engaged in?

A. Yes, sir.

Q. Now on that date, May 26, 1953, did you have occasion to go to premises 1115 Massachusetts Avenue, Northwest?

A. Yes, sir, I did.

Q. What time did you arrive there?

A. Between 7:45 and 8:00 a. m.

Q. When you arrived at 1115 Massachusetts Avenue, Northwest, what did you do?

A. I went into the building.

The COURT: What was the date, please?

The WITNESS: It was May 26, 1953.

I went into the building. As I went through the front yard to the building, I saw an elderly lady lying on a stretcher and two firemen had the resuscitator on her. I continued on into the building through the front door. This is a three-story brownstone front building with a basement. As I went in the front door, the second room to my left as I went down the hallway, there was evidence of two fires having occurred, two separate fires.

[192] Q. Two separate fires?

A. One along the east partition of that room and one along the north partition of the room, which is across the room from that point.

There was also evidence of another fire having occurred, a third separate fire, underneath the stairway of this hallway opposite the room which I just had reference to. Then I continued on throughout the building, and when I went into the basement, I saw evidence of another fire having occurred at the foot of the rear basement steps, the rear of the building, about six feet after you get to the bottom of the basement steps, along the east wall.

And in the front room of this basement, which is—the building is approximately 50 feet deep—in the front room of this basement, there was evidence of another fire having occurred along the east wall, about 15 to 20 feet inside the front basement door. On the first floor up there I detected an odor of what appeared to be a turpentine odor and examined it. To a degree it had an odor of turpentine about it.

Q. Which fires were they?

A. That is on the first floor, the two fires in the center room on the first floor. I went on back into the kitchen there and saw a quart turpentine bottle. It was empty except for a little dampness in the bottom of it. I unscrewed the cap, and it did have the odor of turpentine in it. I saw [193] while I was in the kitchen also a box of stationery sitting on the table; it is a white enameled top table, with a pencil and a pair of reading glasses beside it, and on lifting this, underneath this stationery box, it was white and clean, and all around it throughout the other surface of the table was discolored from the heat and smoke.

Q. As an expert on fires, the origin of fires, did the fact that the surface underneath the letter box was clear indicate anything to you?

A. Yes, that the box was in place there where it was previous to the fire and the smoke and the heat and the outline of the box, of course, sitting on the table, protected that portion of the table from the discoloration of the heat and smoke.

Q. Getting back to these fires for a minute, you said you saw evidence of fires. Will you describe what evidence you saw of fires?

A. Along the north partition of the second room, inside the front door, was a fire that had occurred down low on the floor. It had burned the basement and the floor, it had burned a hole through the floor. There was deep charring throughout the immediate area. There was miscellaneous scrap lumber and some trash and other things that had been on fire. The cracks were burned out very deep in an irregular pattern around there, which indicated to me that it had been an inflammable liquid involved.

[194] Q. Why do you say that? Will you explain that a little bit?

A. The deep burning of the cracks—any liquid that is

poured or spilled on the floor will seep down into cracks, and that liquid in the cracks will burn down in deep as well as on the surface, and you will have a distinct burning in the cracks of the wood, whereas any bulk material lying on the floor will burn in a regular pattern the same depth as to where the material is and it wouldn't burn down into the cracks like the inflammable liquid, which would be spilled and then the cracks would burn. Also, you have a distinctive checkered, what we term as an alligator effect in the wood, which more or less raises and cracks the wood into squares.

Q. What is this alligator effect, what causes that, in your opinion?

A. It is the intense heat in that area; it is not consuming the wood itself, but it is the intense heat that causes it to raise and more or less disintegrate and looks something like charcoal rather than burnt ashes.

Q. That would be caused by what, in your opinion?

A. The inflammable liquids.

Q. All right, then, go ahead now. What else, if anything, did you notice about these fires?

A. Of course, on the east wall was this other fire that had [195] occurred aolng the partition; it started down low in the floor. There was a door frame there that hadn't been put in place. The partition hadn't been completed; it was in the process of being installed. There was some tar paper running up and down the partition; where the metal lathe had been burned, it had been turned. The 2 by 4 studdings had been burned and had gone up to the ceiling.

In the hallway outside of this room, underneath the stairway, there were two stepladders stored, and back in the corner by the radiator, between the radiator and the corner, was some trash and a few scrap boards that had burned and had caught the bottom base of the ladders. In the basement, the one in the rear, at the foot of the basement steps, was scrap lumber, wooden screen frames, a wooden door and scrap lumber, as I say, had been involved in the fire.

Of course, they have a concrete floor there and a brick wall, and it didn't catch the floor or the wall. In the front of the basement, about 15 feet inside the front basement entrance, there was another fire, which would be about 20 to 30 feet from the other fire in the rear.

Q. Any connection between the two?

A. No, no connection between the two.

There was a box spring frame, lawn mower, a coil of rubber hose, garden hose and double pieces of scrap lumber that had been on fire. Of course, there was still smoke and [196] heat in the building when I went in. The fires had been extinguished when I got in there. There was water over the floor and so forth.

Q. Now in your opinion as an expert, did these fires result from natural causes or were they self-started?

A. No, sir; in my opinion, they were caused by some person. We had evidence of the five separate and distinct fires; no connection between the two; no communication between any of the two or any of the five. The materials, the type of materials that were on fire was not the type that would cause any spontaneous ignition or there was no electrical wiring involved in any way in any of the fires. There was just no cause for the fires to be found other than intentionally set.

Q. Did you consider the odor of turpentine in reaching your opinion?

A. Yes, sir, the odor of the turpentine on the floor also.

Q. Do you have any opinion as to which fires, the fires on the first floor or the fires in the basement, were started first?

A. I believe the fires on the first floor were started first due to the fact that the fire had burned completely through the floor in a couple spots and the extent of the fire, and then the type of material that was on fire in the basement, of course, would burn more readily than the floor itself would [197-198] upstairs.

Q. Did you ascertain which room in that house was the room occupied by Betty Brown, the deceased in this case?

A. The front room immediately to the left as you enter the front door.

Q. And those three fires on the first floor that you have described were where in relation to Betty Brown's room?

A. They were in a room directly in the rear of her room, which would be the center room or the second room from the left as you enter the front door.

Q. Now you have related that you found a bottle which had the odor of turpentine in it, you say?

A. Yes, sir, in the kitchen.

Q. Did you take that bottle into your possession and mark it in any way?

A. Yes, sir, I did.

Mr. FLANNERY: Mark this the next exhibit number.

* * * * *

[199] Q. Now I will ask you this. Did there come a time when you had occasion to talk to the defendant in this case, Mr. Green?

A. Yes, sir. On the same day, May 26, about 3:00 p.m., I went with Fire Marshal Roberts to D. C. General Hospital, which was then known as Gallinger Hospital, and I talked with Mr. Green in the strong room there at the D. C. General Hospital.

Mr. Ford: May we approach the bench now, Your Honor?
THE COURT: Yes.

(At the bench:)

Mr. FORD: We want to give the Government notice that we challenge the admissibility of this conversation, and the first notice I have now is that he testified that he talked to him in the strong room at the hospital. So with that statement, we are going to challenge any conversation he had with the man, because he says he was confined in the D. C. General Hospital in the strong room. In the absence of a showing of anything else, we think that is enough for us to raise the challenge.

MR. FLANNERY: Would Your Honor suggest a hearing out of the presence of the jury or shall I ask the usual [200] questions as to whether there was any force or duress used?

THE COURT: Well, we'll be as sure as we can about it. I think we will hear the testimony. How long is that going to take now?

MR. FORD: We don't think under the late decisions that you are limited to force and duress, because we have a late decision about brainwashing. You don't even have to go near the person to touch him. Yes, it has been in the Federal courts, since Russia has shown that that is a greater torture than others.

MR. FLANNERY: It shouldn't take long, Your Honor, maybe 15 or 20 minutes, if that long.

THE COURT: All right, I will ask them to step out.

(In open court:)

THE COURT: I will ask the jury to keep in mind the admonition and step out of the courtroom until I call you back. Absent yourselves from the room, but don't get too far away, please.

(Whereupon, the jurors left the courtroom, and the following proceedings were had in the absence of the jury:)

THE MARSHAL: They are all out, Your Honor.

EXAMINATION ON VOIR DIRE

By Mr. FLANNERY:

Now, Inspector Kelly, you have testified, I believe, that on May 26, around 3:00 p.m., you went to what was then known as Gallinger Hospital, what is now D. C. General [201] Hospital, and had occasion to talk to the defendant, Everett Green.

A. Yes, sir, that is right.

Q. Now you said that was in the strong room at Gallinger Hospital?

A. That is what I was told. I asked where he was and they said he is in the strong room. It was some room upstairs where they had a policeman—I talked to a policeman and asked him if I could go in and speak with Mr. Green, and he asked Mr. Green, and Mr. Green said okay.

Q. When you went in to talk to Mr. Green, where was he?

A. He was in bed, in a ward with about 12 other persons.

Q. 12 other people in the ward?

A. Yes, sir.

Q. Did you question him?

A. Yes, sir, I did.

Q. Before questioning him, did you make any promises to him in return for what he might say to you?

A. No, sir.

Q. Did you threaten him?

A. No, sir.

Q. Did you use any duress on him?

A. No, sir.

Q. Did you physically assault him?

A. No, sir.

Q. The questions that you asked, did he answer freely [202] and voluntarily as far as you know?

A. Yes, sir, he did.

Mr. Flannery: Your witness.

By Mr. Ford:

Q. Now, Lieutenant, how did you know he was at Gallinger?

A. I am not positive how that information came to me.

Q. Tell us, even if you're not positive, what it was, the information.

A. I know I inquired from someone as to where he was; whether it was from the Homicide Squad or whether it was at Emergency Hospital, I am not positive, but I learned that he was at the D. C. General Hospital.

Q. What time of the day was it you say you went to the hospital, to Gallinger?

A. About 3:00 o'clock p.m.

Q. Isn't it a fact that you called Emergency Hospital and you asked if he was there?

Oh, by the way, you knew that he had been carried to Emergency Hospital, did you not?

A. That is what I heard, yes, sir.

Q. You also heard, did you not, that he had been carried there from Massachusetts Avenue in an unconscious condition?

A. No, sir, I didn't know how he was carried.

[203] Q. You have told us that when you came to the fire, there was a lady out on a stretcher. Did you see a man lying there on a stretcher, to wit, Mr. Green, who had been carried there by the firemen from the bathtub where they had found him face down? You had no knowledge of that?

A. I didn't see Mr. Green there, no, sir.

Q. And you had no knowledge of it?

A. I heard that a man had been taken to Emergency Hospital. I didn't know what condition he was in.

Q. And did you know that the man you had heard had been taken from there unconscious was the man you were going to talk to—we wouldn't just use his name, but that he was the man you wanted to talk to?

A. I wanted to talk to anyone I could that was in the house at the time these events took place.

Q. So that when you went out to Gallinger Hospital, you knew you were wanting to go out there to talk to a certain male, a man; correct?

A. Yes, sir.

Q. And you knew when you went out there that that man you wanted to talk to was the man who had been carried out of that house where there was the fire?

A. Yes, sir.

* * * * * * *

[204] Q. Did you know that he had been carried to Emergency Hospital?

A. That is what I was told, yes, sir.

Q. And isn't it a fact that when you called there, they told you at Emergency that he had just been transferred from Emergency to Gallinger?

A. I am not positive how that information came to me. I could have called Emergency, or I could have gotten it [205] from the Homicide Squad. I did learn that he had been transferred to Gallinger Hospital.

Q. Yes, but I am particularly directing your attention to not that he had been transferred alone, but that he had been transferred at a certain time of the day, trying to associate it with the time you went to Gallinger.

A. No, sir, I don't know. I don't recall whether I was told what time he was transferred or not. At the time I received my information was that he was now in Gallinger Hospital.

Q. Have you ever looked at any of the records of Emergency Hospital to see what their record shows as to the time he was transferred?

A. No, sir.

Q. Now you say you went into the hospital and you say the fire marshal was with you, Mr. Roberts, who had been a witness here?

A. Yes, sir.

Q. And when you walked in, where was it and who did you talk to?

A. I talked to a metropolitan policeman in a small office off a corridor on either the second or third floor, I believe.

Q. Now at that time, did you know that members of the Homicide Squad had already talked to him?

[206] A. Yes, sir, I was told that they had talked with him.

Q. Who was it that told you that; who were you talking to?

A. Sergeant Couture.

Q. And where was it you had the conversation with Couture?

A. At 1115 Massachusetts Avenue.

Q. And what time of the day was it that you had the conversation in which Couture told you he had talked to the man?

A. I believe it was approximately 10:00, 10:30 in the morning.

Q. When Couture told you he had talked to the man, did Couture recite to you what he, Couture, had asked the man and what the man had answered?

A. No sir, not in detail.

Q. Well, when you say no, sir, not in detail, what did he tell you, be it in detail or in generality?

[207] A. It was along the lines that he had been to Emergency Hospital, he had talked to Mr. Green and that—well, I don't remember what he said that Mr. Green told him.

Q. Have you given us all of the conversation between you and Couture regarding Couture's talking to Mr. Green?

A. There was some mention of an undershirt that had blood on it, and I believe that Couture had that in his possession at the time that he was talking with me. I know he did mention the fact that he couldn't find any holes in the undershirt and it did have some blood on it, and I believe that was about the extent of what he said that he had found out from Mr. Green.

Q. Didn't he talk to you about a pick?

A. Yes, there was an ice pick found on the premises when I was——

Q. That isn't what I asked you. My question is not what was found on the premises. My question is, did you talk to Couture and did you talk to Couture about a pick?

A. Yes, at 1115 Massachusetts Avenue, Northwest.

[208] Q. For the purposes of my question, I want to limit your conversation with Couture, no matter who was there, so long as Couture was having a conversation with you. What else did Couture tell you at this time at Massachusetts Avenue?

A. I don't recall any more definite conversation. It was a general conversation, I know, but I don't remember it in the exact words or his statements or my replies, I don't remember.

Q. Well, let me see if I can refresh your recollection. Did Couture, the member of the Homicide Squad, say to you, Look, I can't get anything out of Green, so maybe you try, you go see him? Did he say anything like that? You're a fireman, I'm a policeman?

A. No, sir, I don't recall any such conversation.

[209] Q. There was nothing like that which occurred, was there?

A. No, sir.

Q. Now, what did you go to see Green for?

A. For my own job that I had to do; I had to establish the cause of the fire. I wanted to find out who had caused the fire, and he was the only person that I knew of that would have any direct knowledge of the fires. I wanted to talk to him along those lines.

Q. Along the line of who caused the fire?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now when you talked to Couture what did Couture tell you what Green had said about who caused the fire?

A. I don't recall any definite statements as to that. I know that he hadn't found out who had caused the fires, I know that.

Q. Who, Couture had not?

A. Couture had not, yes, sir.

Q. So that at that time you knew that Couture had not found out, the time he was talking to you, who caused the fire?

A. Yes, sir.

Q. Did Couture so tell you that?

A. Yes, sir.

[210] Q. And that conversation that you had with Couture took place after Couture had talked to the defendant; is that right?

A. Yes, sir, that is right.

Q. Now after you got to the hospital, I understood you

[211] to say you went upstairs and you say you asked the policeman?

A. Yes, sir, there was a policeman in an office there on the corridor and I asked the nurse if I might see him.

Q. Which one did you talk to first, the policeman or the nurse, asking for permission to talk to Green?

A. I talked to the policeman first.

Q. What did you say to him?

A. I asked him if Mr. Green was there and if it would be all right to go in and talk to him.

Q. What did the policeman say; did he give you authority to go in?

A. He said it was okay with him, to ask the nurse.

Q. Then you went to a nurse; right?

A. Yes, sir.

Q. What did you say to her?

A. I asked her if it would be all right if I would talk to him, if he was in the condition that I might be able to talk to him.

Q. You asked if he was in a condition. What did she say about his condition when you asked if his condition was such that you could talk to him? What did she say his condition was?

A. She said it's all right to go in and talk to him.

Q. So that when she said to you it's all right to go in and talk to him, she didn't mention what his condition was; [212] she didn't answer that question, did she, what his condition was?

A. No, sir, not definitely. She says it's all right to go in and talk to him.

Q. Yes, but I am talking about his condition. Did she say that he was sick?

A. No, she didn't say how bad off he was.

Q. She didn't say anything about his physical condition, did she?

A. No, sir.

Q. Now, after the nurse gave you the permission, did you ever go to any doctor on the staff, any one of them at District General Hospital, and ask them if this man was in a physical and mental condition sufficient for you to talk to?

A. No, sir.

Q. Did you ever go to any doctor at all or interne at D. C. General Hospital?

A. No, sir, not that I recall.

Q. So the only two people you went to to ask permission was a nurse and a policeman; is that right?

A. That is right.

Q. I wonder if you would describe to us what you meant and referred to when you said a strong arm room?

A. I said a strong room.

Q. A strong room?

[213] A. Yes.

A. Well, I didn't know what they meant by a strong room when they told me that.

Q. Who told you that?

A. Whoever I got the information from that he was there, where he was. They said he's in the strong room at Gallinger Hospital. I didn't know what they meant; I have never been there before.

[214] Q. When you got there, at least in this room and had permission—now describe this to us, will you, please, this strong room?

A. It has possibly a dozen or maybe 14 beds in it; it is a large room. It has bars across it and it is locked. The officer had to get the key, unlock the door and allow me to go in.

Q. Now it is the police officer?

A. Yes, sir.

Q. Who got the key?

A. Yes, sir.

Q. Opened the barred door and let you in?

A. Yes, sir.

Q. And did Chief Roberts go in with you?

A. Yes, sir.

Q. Up to this time, when the policeman opened up the [215] strong room with the key and you went in, had you talked to Green at all?

A. No, sir.

Q. Now you are inside the room. Did the officer lock the room behind you?

A. I am not positive whether he did or not.

Q. Then you walked in, and how many people were in the room?

A. I would say a dozen, approximately a dozen.

Q. Who did you ask for? Now you are in the room. How did you know who to talk to?

A. I asked the nurse who was Mr. Green.

Q. That is before you went in?

A. Yes, sir.

Q. Okay. Now when you are talking to the nurse before you went in, you are outside of this strong room and it is closed, isn't it?

A. Yes, sir.

Q. What did you ask her?

A. Asked who, the nurse?

Q. Yes.

A. I asked her if it is all right if I could go in and talk to him.

Q. Yes, but how did you get to know which one of the 12 in the room was Green?

[216] A. She pointed him out and said that's him over in the corner bed.

Q. When did she do that, before or after the policeman opened the door?

A. Well, that I am not positive, whether it was before or after.

Q. Did this nurse go in the room with you and did the chief marshal?

A. Yes, sir.

Q. And was it a male or female?

A. It was a girl.

Q. And she was on duty there at that hospital at that time?

A. Yes, sir.

Q. Now that is three of you going in, the nurse, you and the fire marshal?

A. Yes, sir.

Q. Is that right?

A. That is right.

Q. Now when you went in, who was the first one to speak after you got in the room?

A. I wouldn't be definitely sure of that, whether it was the fire marshal or myself.

Q. Was Green lying in bed at the time or was he up and walking around?

[217-218] A. He was lying in bed.

Q. And then who was the first one to speak in the room?

A. I am not sure. I know I did speak to him almost immediately as we went in, "Hello, Mr. Green"; I shook hands with him.

Q. Is he still in bed at the time he is shaking hands?

A. He raised up. He sat up on the bed.

Q. You shook hands with him, did you?

A. Yes.

Q. What is the first thing you said to him?

A. I asked him, "Mr. Green?"

He said, "Yes."

I said, "Well, I would like to talk to you."

I identified myself and the fire marshal was along with me. I am not sure what the fire marshal might have said to him, but I am sure he said something.

Then I began to ask him, "Where were you when you discovered the fires? What happened up there? What can you tell me?"

And he began to tell me the conversation about the first.

Q. Did you examine him in any way?

A. Yes. I asked him, I said, "How bad are you hurt?"

* * * * * * *

[219] Q. Now my question is, did you physically examine Mr. Green when you approached the bed in which he was lying in the strong room?

A. He pointed out to me certain things on him and I looked at them. I didn't feel them. I didn't examine them, because I wouldn't know, anyway. He had a patch across his chest, I know that.

Q. What do you mean, a patch?

A. A bandage with adhesive tape across about the center [220] of his chest here, I would say, about a four-inch bandage across the center of his chest.

Q. A four-inch square bandage across the center of his chest?

A. Yes, sir.

Q. Did you say it was adhesive or did it go around him?

A. Just tacked on with a little piece of adhesive around the edges.

Q. And, of course, obviously you didn't know what the wounds were that were underneath that, did you?

A. No, sir.

Q. Okay, now what other marks?

A. He showed me two small dots, marks, underneath, on each side of his throat here, right underneath his chin (indicating).

Q. Were they covered by a bandage?

A. No, sir.

Q. You describe them to us, the two.

A. About the size of the head of a pin, I would say.

Q. Would you say about the size of the head of this instrument which I am now showing you, which is Government's Exhibit No. 2, a pick; would you say about that size?

A. Yes, sir. They weren't very large. They were tiny places there.

Q. When you say they are not very large, you don't mean [221] an open gap wound? For instance, this doesn't make that kind of a wound, does it?

A. That is right.

Q. You stick it in the flesh and pull it out and the flesh closes and you see a pinhead with this; right?

A. Right.

Q. How many of those were there?

A. Two, one on each side of his neck, just underneath his chin.

Q. Here (indicating)?

A. Yes.

Q. Did they have medication on them or were there any signs of blood or any signs of medication or were they open and raw?

A. I am pretty sure they had been painted with some kind of a——

Q. So there was some type, you believe, of medication?

A. Yes.

Q. Now, let's go to any point in back of his head. Did you see anything?

A. No, sir, I didn't see any mark on the back of his head.

Q. Now, if you can, tell me how you tell us the time when you arrived there at Gallinger.

Your Honor, ordinarily that is not important, but I want [222] to try to get it up with the time he left the other hospital.

A. It was approximately 3:00 p. m.

Q. Did you sign any papers in there at Gallinger showing

a visitor's pass or a visitor's application to be permitted to go through the hospital or anything of that kind at the front desk?

A. No, sir, not at the front desk.

Q. Or did they issue you a pass?

A. No, sir.

Mr. FORD: Your Honor, that, I think, is all I have to ask him. That brings me up to the conversation itself at that point.

The COURT: Mr. Flannery.

By Mr. FLANNERY:

Q. Now you say that during this conversation he was sitting on the side of the bed and also during part of it he was standing?

A. That is correct, yes, sir.

Q. Will you tell us, please, what the conversation was that you had with the defendant, Green; what did you say to him and what did he say to you at that time?

A. I asked him where he was when the fires took place or when he first smelled smoke, and he said he was upstairs in bed, that he had awakened about 7:00, the usual time, [223] got up to go down and make coffee, and as he descended the stairway, coming down to the first floor, he smelled smoke. And he came on down to the first floor.

I asked him if he attempted to find any fire on the first floor, and he said no, that he figured it must be coming from the basement. He said he went on into the kitchen, opened the door to the basement steps from the kitchen, snapped on the light and went on down. He said that the smoke got stronger as he went down the stairway to the basement. As he got to about the foot of the stairway, he said, this tall, heavy-set, light-skinned colored fellow moved at him from in the smoke toward the steps. He said the man didn't utter a word. He shoved him, knocked him onto his back. He got astraddle of his stomach, and he said he had a long, shiny dagger in his hand about that long (indicating), with a hilt on it. He had it in his right hand.

Q. When you say that long (indicating), for the purpose of the record,——

A. About that long (indicating). That is the way he measured it for me.

Q. Would you say six to eight inches?

The COURT: For the purpose of the record, about how far?

The WITNESS: About six inches long, that is the way he measured, about six inches long.

[224] Mr. FORD: Well, we can agree that this dagger here is between four and six inches long.

Mr. FLANNERY: Yes.

The WITNESS: He said that the man didn't utter a word; he just started jabbing him in the chest as hard as he could, and he said he was sticking it right up to the hilt.

By Mr. FLANNERY:

Q. Up to the hilt?

A. Yes, sir.

So he said he jabbed him maybe a dozen times, he doesn't know how many times.

I asked him if he struggled, if he tried to protect himself, if he hollered out or tried to give any warning.

He said no, that he didn't; the man was on him, jabbing him so hard and so fast that he didn't have time to do anything. So he said finally the man just got up off of him and ran toward the rear of the building, and he didn't know where he disappeared. He then said the fire was burning right bad right near were he was lying on the floor, right opposite the bathroom door, and he crawled right on into the bathroom because he remembered there was a bucket in there that he usually kept; and he was going to get the bucket to put the fire out. He said he couldn't find that bucket. So then he said he decided to run some water in the bathtub so that he could get in the bathtub and put his nose [225] down close to the water and breath.

I asked him if he attempted to get back up the stairway, and he said no, that he was trying to get the bucket to put the fire out. And then he said that he then heard the firemen crashing in the front door and he heard the sirens coming first, then he heard the firemen crashing in the front door. They came on back and they found him and they dragged him out. He said as they were dragging him out of the basement, he lost one of his shoes, so he said he didn't have any shoes.

Q. He didn't say he was unconscious when the firemen took him out?

A. No, he never said he lost consciousness. He said he was just trying to hold his head down close to the water so he could still breath and not be suffocated from the smoke. So he said they then took him on to Emergency Hospital.

Q. Did you ask him anything else? Did you ask him whether or not he had written any letters?

A. Oh, yes, I asked him if he had—I asked him if he had been writing, if he had written any letters that night, and he said no, he hadn't been writing.

And I said, Well, I saw a box of stationery and his reading glasess on the table there and a pencil, I thought maybe you might have been writing, and he said no, I hadn't.

I also asked him when he came down the stairway and [226] he smelled smoke if he knew that there was a fire in the building, and he said yes, there must be a fire in the building.

And I asked him if he had attempted to go to Miss Betty Brown's room to arouse her to get her out of the building or turn in an alarm, and he said no, that he figured he could go on into the basement and if there was a fire down there, he could put it out and that would be all there was to it.

Q. Did he tell you anything about knowing that Miss Betty Brown was dead already or did he say anything to that effect?

A. No, he never mentioned that fact.

Q. What, if anything, else happened, or does that cover it?

A. That pretty well covers it.

I asked him if he knew who set the fires. He said no, it must have been that colored fellow that attacked him that set the fire.

Mr. FLANNERY: Now, Your Honor, this witness also two days later, on May 28, had occasion to again question this defendant. Do you think we should go into that, too, at this time?

Mr. FORD: I would like to clear up this particular one, Your Honor, because of its close proximity to the happening of the events.

The Court: Suppose you cross examine as to this event

[227] and then, Mr. Flannery, you may inquire as to the later occasion.

By Mr. FORD:

Q. Did Chief Roberts or did he not question Green in this strong room on the occasion and at the time we are talking about?

A. He only talked to Mr. Green briefly. He didn't hear all of the conversation.

Q. He didn't hear?

A. He didn't hear all of our conversation.

Q. Who do you say didn't hear it?

A. Chief Roberts.

Q. Why didn't he hear it?

A. He says, well, I'm going on outside here and talk to the policeman or somebody; I don't know where he was going.

Q. So he left before all of the conversation took place and that is what you predicate your answer upon; is that right?

A. Yes, sir.

Q. Did the nurse leave, too?

A. Yes, the nurse didn't stay there and hear the conversation.

Q. So that all of this conversation that you are talking about was only had by you and not in the presence of anybody else, neither the nurse nor the chief, except you and [228-232] this defendant; is that right?

A. That is, all of the conversation. Part of the conversation Chief Roberts heard, and how much I am not sure, but not much of it.

* * * * * * *

[233] EVERETT D. GREEN, the defendant herein, was called as a witness in his own behalf, and having first been duly sworn, was examined and testified as follows:

EXAMINATION ON VOIRE DIRE.

By Mr. FORD:

Q. Now, Mr. Green, I wish you would speak slowly and keep your voice up so His Honor may hear you and Mr. Flannery may hear you.

What is your full name?

A. Everett D. Green.

Q. How old are you?

A. I am at the present time 64 and approximately a half.

Q. And you are the defendant in this case?

A. Yes, sir.

[234] Q. Now, Mr. Green, my questioning at this particular time is only going to relate to the incidents of the 26th of May.

A. Yes, sir.

Q. I am limiting it to that.

Now, on the 26th of May, do you recall at sometime in the morning when you were carried out of a certain premises?

A. I would imagine it was around 8:00 o'clock.

Q. In the morning?

A. Yes, sir.

Q. Do you recall the date?

A. The 26th of May, '53.

Q. These premises,—what is the address?

A. 1115 Massachusetts Avenue, Northwest.

Q. Did you on that day live there?

A. Yes, sir.

Q. At the time, who carried you out, do you recall?

A. I don't recall who carried me out. I was carried out evidently from the basement bathroom, and I didn't realize anything until after I got out there and they shot some oxygen into me.

Q. Where were you when the firemen were administering the oxygen to you?

A. I was on the front sidewalk on the stretcher of the rescue squad.

[235] Q. Then were you taken anywhere?

A. They carried me to Emergency Hospital.

Q. Do you know where Emergency Hospital is located?

A. Yes, sir, on New York Avenue, in the 1700 block.

Q. Northwest; correct?

A. Yes, sir.

Q. What happened when you got to Emergency?

A. They carried me in what I thought and was almost certain was the emergency room. I was on a slab there practically all day long up until about 3:30, when they transferred me to Gallinger.

Q. So that you were in the emergency room, until about what time of the day?

A. Approximately between 3:00 and 3:30, to be accurate.

Q. When they took you from Emergency—to where?

A. To Gallinger Hospital.

Q. How were you taken there on that afternoon?

A. In the Health Department ambulance. There was a policeman inside there sitting alongside with me there.

Q. In this ambulance which carried you at 3:00 or 3:30 from Emergency, were you on a cot?

A. I was on a stretcher laying out flat, with nothing but a sheet over me, not any article of clothing on whatsoever.

Q. But, however, you were on a stretcher?

A. Yes, sir.

[236] Q. What we call a stretcher.

And were you carried out of Emergency Hospital to the ambulance on a stretcher?

A. Yes, sir.

Q. And then on that stretcher were you transferred to the ambulance?

A. Yes, sir.

Q. And was it in that ambulance that you were taken to Gallinger?

A. Yes, sir.

Q. Now, when you were in Emergency Hospital, after you got there, say, around 8:30 in the morning until 3:00 or 3:30 when you were transferred from there, did you receive any medical treatment while you were in Emergency?

A. Yes, sir. They sterilized the wounds in my chest; they probed in some of them, and they treated the two wounds in my neck, one on each side, and I had nine stab wounds by that ice pick in my chest. Now the homicide officer——

Q. Wait, you are leaving these occasions. I want to stick right to this occasion.

A. All right.

Q. And you did receive medical treatment from the doctors and the nurses at Emergency; is that correct?

A. Yes, sir. To add to the treatment there, I was blinded by the smoke and the soot, completely blinded. I couldn't [237] see a thing.

Q. By the way, I notice you wear glasses. Directing your attention to May, could you see without glasses?

A. Very little; everything is blurred.

Q. What is your sight without glasses?

A. Just about 50 percent of what it ought to be.

Q. And on that occasion, did you have your glasses with you?

A. No, sir. They were lost somewhere along the route or in the house, I don't know where.

Q. Did you have any glasses when you were taken to Gallinger?

A. No, sir.

Q. Were you ever furnished any glasses at any time?

A. I applied for glasses at the D. C. Jail, which ought to have been issued to me, but they made a bluff and——

Q. We wouldn't go into that. What I mean is whether or not you had glasses when you were at Emergency or when you were in Gallinger that afternoon. Did you have glasses?

A. I think the homicide officer picked up my reading glasses at the house and brought them over to Gallinger to me.

Q. What was your physical condition when you were taken to Gallinger Hospital, either your physical or mental condition, when you were taken over to Gallinger Hospital that afternoon?

[238] A. Well, while I was in Emergency Hospital, about the middle of the day I asked the nurse if she would please get me a swallow of water.

She says, I will have to ask the doctor first.

Well, the result was I didn't get any water, nothing to eat in any way, shape or form until I left there between 5:30 and 4:00 o'clock.

Q. Now in the afternoon, when you were at Gallinger

Hospital, did there come a time when certain firemen came to see you in Gallinger Hospital that afternoon?

A. Yes, sir, Inspector Kelly and another officer.

Q. Can you locate about what time that was?

A. I think they had had supper. I had had a small piece of fried chicken and something light, and I had finished it and was lying flat on my back in the bed.

Q. What kind of a room were you in at that time?

A. It was a ward with about six to eight beds in it, not 12 as the man said.

Q. You just tell us what they were, not what they were not, you see.

A. Yes.

Q. Was it a locked door?

A. Yes, sir, they had a locked door to it.

Q. Could you describe that door any further?

A. It had an opening in the top, it was just with cross-wires, diamond shaped, heavy wires over the top, where a [239] large glass would normally be, and that was open for the air.

Q. Now when these firemen came to see you, up until the time they came to see you, or at the time they came to see you, how did you feel?

A. I felt pretty bad.

Q. I wonder if you can describe how you were feeling physically and mentally at the time the firemen came in the room to see you, into the locked room?

A. I was weak and slightly dizzy.

Q. Did you have any pains of any kind?

A. I have had pains in my chest ever since the thing happened from time to time.

Q. The question is, did you have any at the time that the officers were there?

A. Oh, yes, sir.

Q. Were you in the bed or out of the bed or sitting up or lying down, which was your position in the bed, when the firemen came?

A. I was completely lying on my back the entire time they were in, with one exception just before they left, and I will tell you why I propped myself up on my elbows and raised up and spoke a little later on.

Q. Were they there a time when you did raise up on your elbows?

[240] A. That was just when they suggested something to me that I didn't like.

Q. What was the first thing that the firemen, anyone of them, said to you at the time they came in the room when you were lying in bed?

A. The only one that had anything to say to me was Inspector Kelly. The other man ever opened his mouth at any time.

Q. So the only one you had conversation with or he with you was Inspector Kelly, and the other foreman never talked to you at all?

A. No, sir, he stood back by the foot of the bed.

Q. He stood there at the foot of your bed?

A. Yes, sir.

Q. Now what was the conversation between you and Inspector Kelly at Gallinger?

A. He questioned me quite a bit about the fire and so forth, about getting up and which steps I came down, and all such as that. And I told him about this man coming up to me as I got to the foot of the steps in front of the bathroom, hitting me and knocking me out, and like that, and then he got off finally. After considerable conversation—well, he wasn't in the room, I should judge, not over three or four minutes—then he said to me—this was the point that brought things to a close.

[241-252] Q. What was it he said?

A. I will add now what I had on. I didn't have a thing on, nothing but a sheet over me in bed.

Well, when he said to me, "Now, look here, Mr. Green, you're getting up in years and," he says, "you know you're not very long for this world. Why don't you clear yourslf with your keeper?"

Q. Why don't you what?

A. "Why don't you clear yourself to meet your keeper." That was his words, to meet your keeper.

At that, I was lying flat down, I raised up on my elbows. I says, "What in the hell are you sons of bitches trying to do to me, anyway?" They were my words.

At that, they turned around and walked out and the conference came to an end.

Q. And approximately how long would you say he was there?

A. Well, he wasn't in there three minutes.

* * * * *

[253] By Mr. FLANNERY:

Q. Now, Mr. Green, how long did you stay there at the hospital?

A. I stayed there Thursday night—no, Tuesday night, from 3:30 to 4:00 o'clock on, all day Tuesday—no, all day Wednesday, and Sergeant Best from No. 2 Precinct came there with what I think was his boss, a captain, because he had gold braid all over him, around 11:00 o'clock, and they carried me to the morgue.

Q. You walked over to the morgue, didn't you?

A. No, I didn't.

Q. Were you taken on a stretcher to the morgue?

[254-260] A. No. I will tell you what happened. I was undressed. They brought in some clothes over there and I put them on, and they didn't give me any assistance taking hold of my arm and I had to steady myself on the side of the wall as I walked down the hospital.

Q. In any event, you did go over to the morgue on the 28th, didn't you?

A. Yes, sir.

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[261] Dr. DONALD A. BROOKS, was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION.

By Mr. FLANNERY:

[262] Q. Now, doctor, in connection with your duties at the District of Columbia General Hospital in May of 1953, did you have occasion to treat one Everett Green?

A. I did.

Q. At the time you saw Everett Green, did he have some injuries?

A. Yes, he did.

Q. Will you describe to the jury what injuries he had?

A. He had several stab wounds, flesh wounds, about the lower part of his chest in front.

Q. What do you mean by flesh wounds?

A. Well, I mean by flesh wounds that the wounds, on the basis of our examination, did not penetrate beneath the flesh.

Q. Did not penetrate beneath the flesh?

A. That is right.

Q. Now, go ahead.

A. And he had these wounds about the lower part of his chest in front.

Q. Keep your voice up a little bit, will you?

A. He had these wounds about the lower part of his chest in front and he had one small similar wound on either side of the lower neck in front.

Q. Where on the neck; would you indicate on your neck?

A. About in that region (indicating) on both sides.

[263] Q. What type of wounds were they? Were they deep wounds or not?

A. They were not deep wounds. They were superficial wounds.

Q. Had the wounds on the chest penetrated any vital organ?

A. They had not.

Q. Were they superficial also?

A. Yes.

Q. Doctor, I want to show you what has been marked as Government Exhibit No. 7 for identification, which is a record from the District of Columbia Hospital dealing with the treatment of Everett Green, and I will ask you, does that record reflect when Everett Green was admitted to the hospital?

A. Yes, at 2:10 p. m., on May 26, 1953.

Q. And when was he released from the hospital?

A. At 11:00 a. m., on May 28, 1953.

Q. Was there a diagnosis made in his case?

A. Yes, there was.

Q. Did you make it?

A. I did.

Q. What was the diagnosis?

A. Superficial stab wounds of the chest and smoke inhalation.

Mr. Flannery: That is all the questions I have.

[264-266] Cross-examination.

By Mr. Ford:

Q. Dr. Brooks, you were just asked when he was discharged from the hospital, and you said the 28th?

A. That is correct.

Q. For what purpose was he discharged from the hospital on the 28th?

A. His treatment was completed at that time and he was deemed well enough to be discharged from the hospital.

Q. Are you sure of that?

A. Yes, sir.

Q. Let me ask you this——

A. He was discharged in custody——

Q. Sir?

A. I believe he was discharged at the particular time that he was at the request of the police.

* * * * *

[267] By Mr. Ford:

Q. Now, doctor, I am holding in my hand Government's Exhibit No. 2. Now, assuming that I stick this in my body, at least half the length of this blade, and I don't touch any vital organs—because there are places you can stick it in without touching vital organs; correct?

A. You mean in the chest?

Q. Yes, or in my body, sure.

A. That would depend on the depth of the wound.

[268] Q. This instrument I am talking about, just shaped like this—and then I pull it out.

A. Yes.

Q. Now, after I have pulled it out, and you look at the place where I stuck it in and pulled it out, what will you see?

A. I will see a stab wound or a laceration of the skin.

Q. What else will you see? Would it be a big spot, an open wound or what will it leave, this type of instrument?

A. With that type of instrument, it probably would not be a large opening.

Q. Let me ask you this, and I am limiting it now to this type of instrument, Dr. Brooks. In fact, as I pull it out, my flesh closes on the hole that was there, doesn't it, as I draw it out?

A. As a rule it does, yes.

Q. And after I did that you were to take me and put me in an X-ray machine and take an X-ray picture, what would the X-ray show, if anything?

A. That would depend upon whether or not certain vital organs underlying the wound were injured.

Q. Right, Doc; but remember now, we said where it does not hit any vital part.

A. Oh, I see, I am sorry.

Q. So that is part of the question; right?

[269] A. Yes.

Q. So where it doesn't touch anything, it wouldn't show anything, would it?

A. No, it wouldn't show anything at all.

Q. It wouldn't show the wound at all; right?

A. That is right.

Q. Now, how would you probe the depth of that wound after I pull it out; how would you tell how far in my body it went?

A. We have probes that are used for that purpose.

Q. And the probe is an instrument that you would take and what, put it in at that spot?

A. That is right.

Q. And then go in from there?

A. That is right.

Q. And did you do that with this defendant at the different wounds and all of them?

A. I did not personally do it. It was done by a subordinate physician.

The Court: Talk up just a little louder. The jurors down there are having a little difficulty hearing you.

The Witness: Yes, sir.

By Mr. Ford:

Q. Just a minute. Doctor, you didn't do it; correct?

A. That is correct.

[270] Q: You weren't present when it was done, so you didn't see it done?

A. I did not see it done.

Q. So that when you were about to tell us what you believe, that was because of something that was told you; right? In other words, you don't know of your own knowledge that that probing was done because you didn't personally do it, and you weren't present when somebody else did it; right?

A. But I feel sure that——

Q. Well now, wait. It is all right about you feeling sure, but——

A. That is correct.

Mr. Ford: I submit, we are proper when we——

The Court: Yes, you didn't see it and weren't there when anybody else did it; is that correct?

The Witness: Yes, sir.

[271] By Mr. Ford:

Q. Doc, you know from your records that prior to the time the patient was taken to you, he had been to another hospital and received treatment and examination at the other hospital, to wit, Emergency Hospital; right?

A. That is correct.

Q. And, of course, you don't know what the doctors or the interns did at Emergency Hospital in their treatment when they received this patient, do you, of your own knowledge?

[272] A. There is a record here, though.

Q. Other than that record.

A. Other than that record, I do not.

Q. And you don't know who the doctor was who treated him on the morning of the 26th, do you?

A. Not other than is shown by the records.

Q. But you don't know whether he was a surgeon like yourself or whether he was the intern; right?

A. I don't know what, whether it says here or not, but I don't personally know.

Q. When you looked at the patient when he was brought to Gallinger from Emergency, you saw on him some evidence that he had been treated somewhere before he got to you, did you not?

A. I did.

Q. For instance, did he have bandages or anything like that?

A. He had bandages on his chest.

Q. And you knew also that prior to the time they brought him to you for examination, that he had been bathed, such as if there was blood around or anything of that kind, right, or whatever doctor or intern had treated him before, he certainly would, you assume, clean him and wash him so there would be no infection from the wounds?

A. Actually, he cleaned the wounds.

[273] Q. So therefore the patient, as he came to you, would have had that done before he got to you; right?

A. That is correct.

Mr. Ford: We have no further questions of Dr. Brooks.

Redirect Examination.

By Mr. Flannery:

Q. Dr. Brooks, the patient, Green, was discharged because he was well; isn't that right?

A. Perhaps I can clear that up somewhat. We have a routine. We had a routine of discharging patients at any time of day that it was most convenient to discharge the patient. I made the statement to the other attorney that he was discharged at the particular time that he was discharged because it was for the convenience of the police officers. I think he would have been discharged that same day later on, anyway, I believe he would.

Q. In any event, you wouldn't have discharged him if he hadn't been well, would you?

A. I would not.

Q. Now Mr. Ford showed you this ice pick here, which is Government Exhibit No. 2 for identification, and asked you if this ice pick had penetrated someone's body to the length of half the length of this blade, would it leave a small hole, and I believe you said yes, didn't you?

[274-277] A. Yes, usually.

Q. As far as this particular case is concerned, as far as the injuries on this particular man, Green, is concerned, in your opinion, were the injuries on his chest, which you have described as superficial, of such a nature that they

would have been caused by an ice pick of this length going in half its length?

A. In my opinion, no.

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[278] WARREN C. KELLY was recalled as a witness for the Government, and having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION (resumed)

By Mr. FLANNERY:

Q. Now, Inspector Kelly, I direct your attention to May 26th, in the afternoon of that day, did you have occasion to talk to the defendant, Green, in this case, the afternoon of May 26th?

[279] A. Yes, sir, I did.

Q. Where was it that you talked to him?

A. At Gallinger Hospital, which is now known as D. C. General Hospital, in what they call the strong room there.

Q. About what time was that?

A. About 3:00 o'clock p. m.

Q. Was anyone with you?

A. Yes, sir, Fire Marshal Roberts.

Q. Will you describe to what part of Gallinger Hospital you went to see Green?

A. It was on either the second or third floor of the east wing there, and he was inside of a room which had bars around it, with a locked door, with about 12 or 14 other people in a ward. I asked the officer who was on——

Q. You spoke to an officer? No conversation with anybody else now.

A. I spoke to an officer there. I spoke to a nurse there, and I entered the room where Mr. Green was, along with Fire Marshal Roberts.

Q. As a result of the conversation with the nurse and the other person?

A. The officer, yes.

Q. When you entered the room, how many beds were in that room?

A. I would say 12 or 14 at least.

[280] Q. Were they occupied?

A. Yes, sir.

Q. Where was Green?

A. He was in the left-hand corner as you enter the room; over by a radiator, the last bed over to the left.

Q. Was he in bed?

A. Yes, sir.

Q. What did you do then?

A. I approached the bed and introduced myself, asked him if he was Mr. Green. He said he was. I asked him if I might talk with him about the fires at 1115 Massachusetts Avenue, Northwest. He sat up on the edge of the bed and we began talking.

Q. You say he sat up on the edge of the bed. Will you describe what you mean by that?

A. He was lying in a flat position when I entered and he raised up after we said a few words, and he sat up on the edge of the bed, and then during part of the conversation he stood up and stood alongside the bed.

Q. Will you describe what conversation you had with Green relative to the fire at 1115 Massachusetts Avenue?

A. Fire Marshal Roberts didn't stay but a very short while.

Mr. Ford: I move that that be stricken out. He was asked to tell a conversation he had with Green. He starts [281] talking about the fire marshal.

The Court: Yes, just think of the question, please.

The Witness: I asked Mr. Green what he could tell me about the fires that had occurred at 1115 Massachusetts Avenue this morning. And I asked him where he was when he discovered the fires and what he did when he discovered the fires.

He said that he awoke about 7:00 a. m.; he got out of bed and started down the stairs to the kitchen to make coffee, as was his general routine, and as he was coming down the stairway to the first floor, he smelled smoke, a faint odor of smoke, not strong. He didn't stop on the first floor. He went to the rear kitchen and opened the door to the basement steps leading downstairs, and turned the light on and started down the basement stairway. As he got further down the stairway, the smoke began to get denser, and about the time he got to the foot of the stair-

way, he saw a large, tall, light-skinned colored fellow approach him from out of the smoke, come toward him with a dagger in his hand, a shiny dagger which he indicated about that long (indicating), about six inches long, and that the man struck him in the chest, knocked him on his back and jumped on top of him, astraddle his stomach, and began to stab him with the dagger as hard as he could stab him.

I asked him if he cried out for help, if he struggled or [282] attempted to defend himself, and he said no, that the man had him pinned down and he was afraid to do anything, so he lay there.

Q. Did he say how deep the dagger penetrated?

Mr. FORD: I object to that as being leading. The witness is telling the story.

Mr. FLANNERY: It is not leading.

Mr. FORD: Oh, yes, it is and it is suggestive, too, of a certain topic. Let him tell us.

The COURT: Sustained.

By Mr. FLANNERY:

Q. Very well, did he say——

Mr. FORD: Wait a minute. I object.

Mr. FLANNERY: I haven't asked the question yet.

Mr. FORD: Yes, but he was telling the story and he was interrupted, and I submit he is entitled to go right on and tell it.

Mr. FLANNERY: I have a right to ask questions, Your Honor.

The COURT: You may place your question.

By Mr. FLANNERY:

Q. Now, did he say anything else?

A. Yes. He said that the man got up off of him voluntarily and just without saying a word and he disappeared toward the rear of the building, and he said he left this [283] thing sticking in him, and he said it was up to the hilt, and he had to really pull and tug to get it out of him.

Q. He said it was up to the hilt?

A. Yes, sir.

Mr. FORD: Wait a minute. I object to him interrupting and then picking out a particular part under the guise of repeating what he says, like up to the hilt, picking out frightening sentences that are frightening no one.

Mr. FLANNERY: There is no guise being used here. I am just trying to elicit the facts from this witness.

Mr. FORD: Then let him do it. He is doing very we...

The COURT: Very well, I think no harm has been done.

By Mr. FLANNERY:

Q. Proceed, will you, please?

A. He said then that after the man disappeared toward the rear of the building, he crawled into the bathroom; this fire was burning all the time very near where they were struggling, and he said he crawled in the bathroom because he knew he kept a pail in there and he wanted to get it full of water to try to put the fire out. And he couldn't find the pail when he got into the bathroom. So he let some water into the tub, got down into the tub, put his face down near the water so that he would breathe good. [284] When I asked him had he attempted to get out the window of the bathroom to the outside, he said no. I asked him if he had attempted to go back upstairs to alert Miss Brown of the fires and so forth, and he said no.

Q. All right, now, did you ask him any more questions and did he say anything else?

A. I asked him if he remembered firemen coming in there and he said that he heard the sirens while he was in the bathtub, that he heard them breaking the front door open. He remembered them coming in and dragging him out of the bathtub, and on the way out in dragging him out of the basement, he lost one of his shoes, and they then took him to the outside and took him to Emergency Hospital.

Q. Did you ask him any more questions?

A. I asked him if he had been writing, and he said no, he hadn't. That was about the extent of the conversation.

Q. Did you ask him whether or not he had written any letters?

Mr. FORD: I object to that as being grossly leading and suggestive to the witness, picking out a topic, to wit, a letter, picking out a writing and so forth, after the wit-

ness had said that was the extent of the conversation and did not include it.

Mr. FLANNERY: I think it is a proper question, Your Honor.

[285] The COURT: Objection overruled. You may answer.

The WITNESS: Yes, I asked him if he had been writing, if he had written a letter or a note of any kind, and he said no.

By Mr. FLANNERY:

Q. Was that just about the extent of your questioning of him and his answers to you?

A. Yes, sir, so far as I can recollect, that is it.

Q. Now, approximately how long did you talk to Green on that day?

A. Approximately an hour.

Q. Now then, did there come a time subsequent to May 26, 1953 when you had occasion to talk to the defendant, Green, again?

A. Yes, on May 28th, the second day later, I accompanied Sergeant Couture and Sergeant Clarke from the Homicide Squad to Gallinger Hospital again, between 9:00 and 9:30 in the morning, and we three talked to Mr. Green together.

Q. Now will you please relate what Mr. Green said in your presence at that time relative to this fire and the circumstances surrounding it?

A. He told practically the same that he had related on the previous occasion, except he was shown an ice pick and asked if he had had that ice pick around the house, and he said he had two or three ice picks around the house, and asked him if this could be what was used on his chest instead [286] of a dagger, and he said yes, that he does remember now, since he sees the ice pick, that it was an ice pick and not a dagger, because he remembers having to pull it out and it was hard to pull out of his skin. He pulled it out himself, and he does definitely remember then that it was an ice pick.

Q. Was he asked any other question?

A. He was shown a letter and asked if he had written this letter, if that was his handwriting, his signature, and he said yes, that he had written this letter that was shown, and that he had enclosed forty-dollars in the letter.

I asked him when he wrote that letter. I asked him if he

wrote that letter before he smelled smoke and before the fire, and he said yes, I did.

Q. I show you Government Exhibits 4 and 4-A for identification. Is that the letter you just had reference to?

A. Yes, sir, this is the letter.

Q. Did you ask him why he had written the letter?

A. Yes, he was asked that question, and his reply was that he had known Miss Betty Brown for many, many years, they had been closely associated and that she should have the best and that he wanted her to have the best. That is the reason that he wrote the letter and enclosed the forty dollars for flowers.

Q. Was that about the extent of what he told you?

[287] A. Yes, sir, that was about it.

Mr. FLANNERY: That is all.

CROSS-EXAMINATION.

By Mr. FORD:

Q. Now, on the 26th, you say you went out to Gallinger Hospital at what time to interview the defendant?

A. About 3:00 p. m.

Q. And at that time you were a fireman and you were not a policeman; is that right?

A. That is correct.

Q. Prior to your going out there, you had talked to the policemen, though, did you not?

A. Yes, sir, I had.

Q. Who did you talk to?

A. Beg pardon?

Q. Who did you talk to?

A. Detective Sergeant Couture and Detective Sergeant Clarke.

Q. Who were both detective sergeants attached to the Homicide Squad charged with the investigation of deaths, weren't they, as police officers?

A. Yes, sir.

Q. Now, do you in the Fire Department have a homicide squad?

A. No, sir.

[288] Q. When was it you talked to both the detective sergeants from the Homicide Squad on May 26th?

A. That morning at the scene of the fire at 1115 Massachusetts Avenue.

Q. You knew who they were and you knew what their duty was, didn't you?

A. Yes, sir.

Q. Then you decided to go out in the afternoon around 3:00 o'clock, didn't you?

A. Yes, sir.

Q. Did you take a police officer with you to be a witness to this conversation, this lengthy conversation you have just recited?

A. No, sir.

Q. You just took a policeman with you; right?

A. Beg pardon?

Q. You just took a fireman with you; is that correct?

A. Yes, sir, Fire Marshal Roberts, yes, sir.

Q. That is the same gentleman who was here, isn't he, as a witness?

A. Yes, sir.

Q. And was he present when this conversation you recited took place at Gallinger?

A. Not all of it.

Q. Now you were asked to describe the room that the de-[289] fendant was in. Did you refer to it as a strong room that they had him in when you went there?

A. Yes, sir.

Q. How did you get in the room; who opened the door, if anybody, for you?

A. The officer let me in.

Q. So there was a policeman on duty there, was there?

A. Yes, sir.

Q. And he got a key and let you in?

A. Yes, sir.

Q. Now did you have the policeman as a witness to stand by and listen to what conversation you say took place?

A. No, sir.

Q. There was a nurse there, wasn't there?

A. Yes, sir.

Q. Was she inside with you two firemen at the time you said you had this conversation with the defendant?

A. No, sir, not all of the conversation.

Q. Did you take her in and ask her to be an independent witness or an outside witness to the conversation?

A. No, sir. She entered the room with us, but she didn't remain.

Q. Now about what time was it on May 26th when you say that you asked this defendant if he wrote any letters? And remember what I am asking: What time on May 26th was it that you asked the defendant whether or not he had written [290] any letters?

A. It was between 3:00 and 4:00 p. m., at Gallinger Hospital.

Q. When you had the conversation with the two detective sergeants in the morning, did they say anything about the defendant writing a letter?

A. No, sir, they didn't say he had written a letter.

Q. You know that the letter was not even received by that lady, do you not, until hours after you had been to Gallinger Hospital?

A. I didn't know when she received the letter.

Q. Then how did you, at 3:00 o'clock in the afternoon, on May 26th, happen to ask him if he wrote a letter?

A. Because I saw an open box of stationery laying on the table, a pair of reading glasses beside it and a pencil beside it, and I assumed that someone had been sitting there writing.

Q. So then, when you walk into a house and you see a table and there is letter paper on it and writing utensils, you assume that somebody had just written a letter?

A. Had been writing?

Q. Yes, had been writing a letter.

A. Yes, sir.

Q. And that in itself suggests to you to ask him if he wrote [291] a letter?

A. I asked him if he had been writing a note or a letter or anything.

Q. Did you use the word letter?

A. I suppose—I am not positive, but I asked him if he had been writing. I specifically asked him if he had been writing anything.

Q. And the reason that you did is because in this house you saw letter writing paper and utensils?

A. Yes, sir.

Q. And would you say that if you walked into my house now and saw letter writing paper and pens and ink you would start asking me if I wrote a letter?

Mr. FLANNERY: I object to that question.
The COURT: Sustained.

By Mr. FORD:

Q. Now, let's go to the time you got here to the premises on Massachusetts Avenue about the fire. You have testified here as an expert, haven't you?

A. Yes, sir.

Q. And you said that on that day you went throughout that house to make a thorough examination, didn't you?

A. I made an examination the best I could of the premises, yes, sir.

Q. In detail, all right?

[292] A. Yes, sir.

Q. It wasn't a superficial examination, was it?

A. It was in detail so far as my line of work is concerned, yes, sir.

Q. And there came a time when you arrived on the first floor; is that right?

A. Yes, sir.

Q. And there came a time when you entered a particular room on the first floor?

A. Yes, sir.

Q. And that was this elderly lady's room, wasn't it?

A. Yes, sir, that is right.

Q. And you went in it?

A. Yes.

Q. And you looked all over the place, didn't you, that room?

A. I didn't examine it as carefully as I examined the other room where the fires had occurred.

Q. Well, in the first place, you knew she had been carried out of that room, didn't you?

A. At the time I first entered, I didn't know which room she had been removed from. I learned later that she had been removed from the front room.

Q. When you learned later, didn't you want to make a careful examination of the room out of which this nice, [293-302] elderly lady was carried?

A. So far as fires are concerned, yes, sir.

Q. Or for any purpose that you saw, including the writing of letters?

Mr. FLANNERY: I object to that.

Mr. FORD: Well, he limited it and I wanted to broaden it.

By Mr. FORD:

Q. You were going to examine it for any purpose, for any leads, for any evidence?

A. That is true, yes, sir.

Q. Weren't you?

A. Yes, sir.

Q. And you did do that, didn't you?

A. Yes, sir.

Q. Now I am going to ask you, was there anything burned inside of that room?

A. No, sir, not burned.

* * * * *

[303] By Mr. FORD:

Q. Now, coming back to the questioning you say you conducted of the defendant, Green, on May 26th in the hospital, I think on direct examination you had shown to you what is marked Government Exhibit No. 6; correct?

A. That is right.

Q. Which is the box with these sheets in it; right?

A. Yes, sir.

Q. And you had that on direct examination.

Now is that the box and letter paper you were referring to when you said on May 26th that you asked the defendant at Gallinger Hospital about writing letters, that that is what motivated you, that article there?

A. Yes, sir.

Q. And that was on the 26th of May.

A. Yes, sir.

Q. Well, isn't it a fact that this box of paper wasn't discovered in Massachusetts Avenue and wasn't taken into [304] possession until May 28, 1953, as written on there in ink?

A. It was discovered on May 26th and removed on May 28th.

Q. You are sure of that, are you?

A. Yes, sir.

Q. Now on May 26th, when you went out to talk to the

defendant, after you talked to both police officers, and took with you the fire marshal, and when you had no policeman with you—on the 28th you say you went out with these police officers two days later?

A. Yes, sir.

Q. How does it happen you were with them and how did it come about that you went out with them on the 28th, or they with you or you with them, police officers, when you didn't take them out on the 26th, when you were going to question him or they didn't take you on the 26th or when they questioned him; how did that come about?

A. They had in their possession a letter which they said they wanted to ask Mr. Green specifically about. They asked me to accompany them.

Q. So it was at their request that you went out on the 28th?

A. Yes, sir.

Q. They didn't request you on the 26th, the day of the occurrence, did they?

[305] A. No, sir. I went out myself.

Q. And you didn't request them on the 26th?

A. No, sir.

Q. But on the 28th, they requested you to go when they questioned the defendant; is that it?

A. Yes, sir.

Q. Now, did you say you had this letter with you when you went out to Gallinger on the 28th?

A. The detective had in his possession.

Q. And it was opened up to him, wasn't it?

A. Yes, sir.

Q. And I think you testified on Direct that there were things you asked him about that letter?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Now tell me, at the time, who was asking him about the letter, you or the detective sergeant?

A. The detective sergeant.

Q. The detective sergeant?

A. Yes.

Q. And you were present?

A. Yes, sir.

Q. And the letter was then open, as it is now; the contents were out; right?

[306] A. Yes, sir.

Q. And the detective had the contents in his mind?

A. Yes, sir.

Q. That is this part which I say contents, the writing; right?

A. Yes, sir.

Q. And as he had it in his hand, the detective read parts of that letter to him and asked him what he meant?

A. No, sir. He handed him the letter and he said, "Did you write this letter?"

Mr. Green looked at it and he said, "Yes, I did."

Q. Now on direct examination you referred to a certain part of it, didn't you? Did he ask him about any of its contents?

A. Oh, yes, I asked him when he wrote the letter. I asked him if he wrote that letter before he smelled smoke, before he knew there was any fire in the building, and he said yes, he had.

Q. Then did you ask or recite anything that was in that letter, any particular part of it all or any sentence in there or phrase or clause?

A. Well, he made the remark that we both want it this —rather, the reason he enclosed the forty dollars was for flowers for Miss Betty Brown's funeral, because he had always wanted to give her the best that she could have and that he thought a lot of her, they had been together a long [307] time, and he wanted her to have the best that he could give her.

Q. Did he in the course of that conversation tell you and the detective sergeant that that forty dollars was the last money he had in this world?

A. Yes, sir. he did.

Q. Did you and the detective sergeant, when you were asking about this letter when you had it, ask him what he meant when he wrote, "a fine and good lady, a true friend to me;" did you ask him what he meant by that?

A. He said that she had been a fine woman, a good friend to him, and that they had been together a long time and were very close.

The COURT: You must speak out for the jury. I know you gentlemen are pretty close there, but everybody must hear.

By Mr. FORD:

Q. And did you ask him what he meant by the next sentence, "We both want it this way"?

A. Yes, sir, and he didn't give an answer to that.

Q. Did you ask him about how friendly he had been with this elderly lady during the past 30 years?

A. Yes, sir. He said they had been together during the past many years, they had been very close friends. He had more or less looked out for her and she for him, and they were very close.

[308-309] Q. And did you ask him and did he tell you during that conversation that he waited on her hand and foot because she wasn't able to cook and he went to the store and did the cooking for her?

A. Yes, sir, that is right.

Q. And did you also ask him and did he tell you during those 30 years that when it was necessary for her to get up out of bed, he would lift her up and put her back?

A. Yes, sir, he would help her in and out of bed.

Q. And did he tell you or did you ask him or was it said during that conversation by any of you that during the past 30 years he would have friends of hers come and visit her and he would go out and get things, like jello and pound cake, so that they could have little parties together there, this elderly lady, himself and her friends?

A. Yes, sir.

Q. And did you ever ask him or did he ever tell you that during these 30 years of being together with this elderly lady, that they never had a cross word with each other or never fussed or fought or never had any trouble with each other?

A. He said they got along very well.

* * * * *

[310-333] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. FORD: Your Honor, may we approach the bench?
The COURT: Yes.

(At the bench:)

Mr. FORD: I reasonably anticipate that with the witness you are about to call, Detective Sergeant Couture, that you are going to ask him if he ever had a conversation with the defendant on the morning of May 26th, and that you are going to offer that in evidence; right?

Mr. FLANNERY: Well, I hadn't planned to call him as my next witness. I was going to call a shorter witness, Mr. Cornelius.

Mr. FORD: Oh, I saw Couture walk in.

While we are here, to save the Court's time, now we are going to challenge the first statement that Couture says or the first interview Couture says he had with the defendant, because he, Couture, interviewed him within one hour after the defendant was carried from the house, about 8:30, at Emergency, that Couture interviewed him at 8:30 on the 26th at Emergency Hospital, which is approximately one hour after he was carried from the scene. So we are going to challenge that one.

The COURT: Well, that being so, perhaps it will be necessary for me to hear that evidence out of the presence of the jury.

Mr. FLANNERY: Yes.
Mr. FORD: Yes.

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[334] LIONEL COUTURE was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. FLANNERY:

Q. Will you state your name, please?
A. Lionel Couture.

The COURT: How do you spell your name?
The WITNESS: L-i-o-n-e-l C-o-u-t-u-r-e.

By Mr. FLANNERY:

Q. You are a member of the Metropolitan Police Force, are you not?

A. Yes, sir.

Q. You are attached to the Homicide Squad?

A. That is correct.

Q. On May 26, 1953, you were also a member of the Metropolitan Police Force, attached to the Homicide Squad, [335] were you not?

A. Yes, sir.

Mr. FLANNERY: May we approach the bench a moment, Your Honor?

The COURT: Yes.

(At the bench):

Mr. FLANNERY: This is the witness that Mr. Ford said that he wanted questioned out of the presence of the jury.

Mr. FORD: In other words, we challenge it because he is going to testify as to the statements made by this defendant at 8:30 on the morning of May 26th, being an hour or less after the time the defendant was carried unconscious from the scene.

The COURT: Very well, gentlemen, I will hear the evidence out of the presence of the jury.

Mr. FORD: You see, Your Honor, I would like to make this clear. We are not contending that he was struck, that the defendant was struck by any policeman or fireman or any interrogator, or that he pushed or shoved. We are not talking about that. We are trying to challenge it on the ground of his actual condition being such that a person in that actual physical condition couldn't make that.

The COURT: Very well.

(In open court):

The COURT: I will ask the jury to keep in mind the ad- [336] monition and absent yourselves from the courtroom until I call you back.

Whereupon, the jurors left the courtroom, and the following proceedings were had in the absence of the jury:

Mr. FLANNERY: Shall I proceed, Your Honor?

The COURT: Yes, you may proceed.

EXAMINATION ON VOIR DIRE

By Mr. Flannery:

Q. Sergeant Couture, in connection with your duties as a member of the Metropolitan Police Force, did you have occasion on May 26, 1953, to go to premises 1115 Massachusetts Avenue, Northwest, in the District of Columbia?

A. Yes, sir.

Q. With whom did you go there?

A. I went there with Sergeant A. D. Clarke from the Homicide Squad.

Q. When you responded to the scene there, did you stay there very long?

A. No, sir.

Q. How long did you stay there?

A. I didn't go in the house. I just stayed out in the yard a few moments, then I left and went to Emergency Hospital.

Q. Was that on information that you received there on the scene?

A. That is correct.

[337] Q. What time did you arrive at Emergency Hospital, your best recollection?

A. The best recollection, between 8:30 and 8:45 in the morning.

Q. When you arrived at Emergency Hospital, to what part of the hospital did you go?

A. I went to the emergency room.

Q. When you arrived at the emergency room, did you see the defendant in this case, Everett Green?

A. I did.

Q. Where was he?

A. He was in the emergency room, to the right on the first floor, in the emergency room. I would say it was an examination room. He was lying on a bed there or examining table.

Q. Was anyone else there in that room?

A. No, sir, not at that time. The doctor kept coming in and out and I believe the nurse kept coming in and out.

The Court: Mr. Flannery, I would like to know whether he was in the custody of the police at that time.

By Mr. FLANNERY:

Q. Was he in the custody of the police at that time?

A. There was no police officer there; no, sir, he was not.

Q. Do you know of your own personal knowledge when [338] it was that this defendant was taken into custody in connection with this case?

A. It was sometime around 10:00 o'clock, but I can't say the exact time.

Mr. FORD: Does that mean A.M. or P.M.?

The WITNESS: A.M., sir.

By Mr. FLANNERY:

Q. Do you know who took him into custody?

A. No, sir, I do not.

Q. What information do you have that he was taken into custody at 10:00 o'clock a. m. on that day?

A. Well, before leaving the hospital, I called the precinct and asked them if they would send a footman over to take charge of this gentleman until we return or until I return to the hospital.

Q. Were you the first policeman that talked to this defendant after this fire?

A. I don't know who talked to him at the scene, but I think I was the first one at the hospital.

Q. You were the first one at the hospital?

A. Yes, sir.

Q. And as far as you know, there was no other policeman there at the hospital in connection with this defendant, Green?

A. No, sir, because I had to call the precinct to send someone down.

[339] Q. Did you place him under arrest while you were talking to him?

A. No, sir, I did not.

Mr. FORD: I submit, I have had difficulty for 33 years determining when a man is under arrest.

The COURT: Well, that is often a very difficult question, and I did kind of want it cleared up whether this conversation was when the defendant was in custody or not, if we can establish it.

Mr. FORD: That is why I was going to object to his con-

clusion, because, Your Honor, I understand the law to be that if a policeman comes up to me and first makes his identity known to me as a police officer and tells me that and I receive that notice, that it might constitute an arrest at that particular time under certain circumstances, if it interferes with my freedom of going or coming or it makes any impression on me. I have run into that in search and seizures.

The Court: You may proceed.

By Mr. Flannery:

Q. Is it your testimony that you did not place him under arrest at that time?

A. Not at that particular time, no, sir.

The Court: You didn't at all, did you? Did you at all?

The Witness: No, sir.

[340] By Mr. Flannery:

Q. You never arrested him?

A. No, sir.

Q. As close as you can, when was it that you began to talk to this man?

A. As soon as I arrived at the hospital, I talked to him.

Q. And again, for the record, that was what time?

A. That was between 8:30 and 8:45.

Q. Before you talked to this man, did you make any threats to him?

A. No, sir.

Q. Did you promise him anything in return for what he might tell you?

A. No, sir.

Q. When you were talking to him, was he conscious or unconscious?

A. He was conscious.

Q. Did he appear to you to answer your questions clearly and coherently?

A. He did.

Q. At that time—well, what did you ask him and what did he say to you?

A. Well, I first asked him what his name was and then I asked him what happened.

[341]Q. What did he say when you asked him what his name was?

A. He told me Everett Green, Everett D. Green.

Q. Then what did you ask him?

A. I asked him what had occurred at 1115 Massachusetts Avenue.

Q. And what did he tell you?

A. Well, he told me that he had gone to bed about midnight the night previous, that he woke up around 7:00 o'clock or about 7:00 o'clock in the morning and he detected an odor of smoke. He said he came down the stairs and didn't see any fire on the first floor and went on down to the basement. I do not recall which set of stairs he told me that he had gone down, whether he went down the front steps or the rear steps.

He said when he got down to the basement, the basement was full of smoke, and he could see a colored man standing in the smoke. He asked the colored man what the so-and-so he was doing in there, he says, and with that the colored man came at him with a long shiny dagger. He said he wasn't sure but he thinks he turned on the bathroom light. There was a bathroom in the basement, and he says he thinks he turned on the bathroom light, but he was not sure. He says after the struggle, the colored man stabbed him in the chest and left the dagger to the hilt in his chest and then left.

He don't know how he got out of the house, and he de-[342] scribed this colored man. He told me the man was about 6 foot, real dark-skinned, between 200 and 225 pounds and bald on top, he said, a bald head. He did not know where the man went. He didn't see him any more.

Q. Did he say anything else?

A. He said the next thing he knew, the firemen were in there.

Q. Then what did he say?

A. Well, that is about all I talked to him about at the hospital at that particular time.

Q. How long did you talk to him at that time at the hospital?

A. Oh, I don't exactly recall. I don't think it was over 15 minutes, probably a little bit more, probably less.

Q. At the time you talked to the defendant, what was his physical condition as far as you could ascertain?

A. Well, he talked good. I did observe he had two marks, one on either side of his throat or his neck, rather (indicating). He had several marks on his chest right in here (indicating), in this area. They were bleeding a little, but they didn't seem to be too bad, I don't know.

Mr. Ford: Your Honor, I don't know what too bad is. If it means that if it is real bad it is fatal, and if it isn't fatal——

The Court: You may cross examine on that point to see [343] what he meant.

By Mr. Flannery:

Q. Did he appear to be burned; did you see any burns on him?

A. I didn't see any burns on him.

Q. While he was talking to you, did he appear to be able to see you?

A. Yes, sir, his eyes were open.

Q. Did he appear to be in any acute distress as far as you would ascertain at the time you were talking to him?

A. No. He appeared to be—he was lying quietly on this table.

Q. Lying quietly?

A. Yes, sir.

Q. During the time that you questioned him, was there a doctor in attendance on him pumping oxygen into him or shooting anything into his veins?

A. No, sir, there was no one in the room. Someone kept coming in and going out. I didn't pay any attention to them.

Q. In other words, he lay there quietly and talked to you for about 10 or 15 minutes?

A. That is correct.

Mr. Flannery: Your witness.

By Mr. Ford:

Q. Now didn't you testify at first that as you were in the [344] room, doctors and nurses came in and out?

A. Came in and out, yes, sir.

Q. All right, now, how many doctors came in while you were there?

A. I don't recall.

Q. Give us your best estimate.

A. The only one I can recall is a doctor by the name of Eilberg, I believe.

Q. Eilberg?

A. Eilberg. I think it is E-i-l-b-e-r-g.

Q. Let me get that again.

A. E-i-l-b-e-r-g. That may not be the correct spelling.

Q. But the name sounds right; right?

A. That is correct.

Q. Is he the only doctor you saw there?

Now I understood you to say you were in there 15 minutes.

A. Approximately that time.

Q. Is he the only one doctor that you saw come in and out?

A. I do not remember all the doctors that were there. There were several of them outside of this room. There is a nurses' table, and there were several doctors around there.

Q. But the only ones I want to talk about are those that came in the room, not the doctors who may be in any other [345] place in the hospital.

A. I don't recall how many came back to that room.

Q. Would you say as many as five came in and out of this same room you were in during the 15 minutes you were there?

A. I wouldn't know whether one came in five times or whether there were different ones.

Q. How many times would you say that a doctor appeared, approximately, in that room during the 15 minutes you were there?

A. I don't remember that, sir.

Q. Would you say more than five?

A. I wouldn't say that. I don't remember that. I wouldn't say it truthfully.

Q. What did the doctor do in that room? Were there any other patients in the room?

A. No, sir, not in this room.

Q. All right, now, when the doctor came in, no matter how many times he came in, or how many doctors, what did they do?

A. Well, some of them, as I recall—there is a medicine chest on the wall. They would go to the medicine chest, then go on out again.

Q. And they had nothing to do with Mr. Green?

A. I don't recall whether any of them came right up to [346] Mr. Green or not.

Q. For instance, at the time you looked at Mr. Green, you described some wounds here on his stomach (indicating).

A. Yes.

Q. Were they exposed or by that time were they covered with bandages.

A. They were exposed.

Q. So there were no bandages on him at all?

A. No, sir.

Q. Now as to the other places that you saw on Mr. Green, did they show no bandages on any of them at this time that you are talking to him?

A. No, sir.

Q. So that if he had bandages on, they were put on after you talked to him; right?

A. That is correct.

Q. Did you see any medication on any of the wounds?

A. I do not recall seeing anything, no, sir.

Q. So that as far as you recollect; on these wounds, you didn't see any medication at the time you were talking to him and you saw no bandages?

A. No, sir.

Q. Were you there when doctors in Emergency put medication on these wounds?

A. No, sir.

[347] Q. Were you there when doctors or nurses put bandages on any of these wounds?

A. No, sir.

Q. So that as far as you know, the wounds that you saw during the time you talked to him had never even been treated yet by any doctor?

A. I don't believe they had, no, sir.

Q. Did you see any doctors probe the wounds to see the depth of them?

A. No, sir.

Q. And as far as you know, that hadn't been done; right?

A. I do not know whether it had been done or not.

Q. What time was it when you arrived at the scene of the fire?

A. It was, as near as I can remember, between 8:30 or 8:15 to 8:30, sometime in between.

Q. A. M. of the 26th?

A. Of the 26th.

Q. And that within half an hour, you were at Emergency Hospital to see Mr. Green; is that right?

A. Yes, sir, less than that, I believe.

Q. Now during your talk with him, he was laying on his back, was he not?

A. Yes, sir.

Q. What was he laying on?

[348] A. Well, it was this examining table they have in the emergency room.

Q. That is where they take the patients in emergency cases, accidents, where they are injured; right?

A. Yes, sir.

Q. And that is the table they use; right?

A. Yes, sir.

Q. He was laying on his back, was he?

A. Yes, sir.

Q. Now you went up to him at this time, to wit, 8:30, and got a look at his eyes. What did his eyes look like?

A. I didn't pay any special attention at the eyes. All I know is that he looked at me.

Q. So that as far as you say now, you did not pay any particular attention to his eyes; right?

A. What I mean, I didn't notice anything unusual about his eyes.

Q. Didn't they look inflammed at all?

A. I don't recall. I didn't make any note of that.

Q. Did they look like they were running, like, say, from some smoke that affected his eyes?

A. They could have been, but I don't recall that.

Q. Did his eyes look real clear to you?

A. I can't say, sir, I don't recall.

Q. Now if you can't say that about his eyes, how were you [349] able to answer his question when he asked you was he clearly looking at you and you said yes? How could you answer that, in view of what you have now told me, sir?

A. I say, he didn't answer me with his eyes closed. He looked at me when he answered. Every question I asked, he was looking at me.

Q. Would you say he was staring at you?

A. No, I wouldn't say that; just like an ordinary conversation.

Q. An ordinary conversation? I am talking about his eyes.

A. That is what I mean, when you are talking to someone.

Q. Like I am looking at you now?

A. Well, he couldn't be staring like you are at me right now.

Q. How can you tell the difference? I did that deliberately. So you can tell when someone is staring at you as you just have done it this distance?

A. Yes, sir.

Q. At the time you were talking to him, you were right up close beside him, weren't you?

A. Right alongside him, yes, sir.

Q. Describe the wounds in his neck as you were right there beside him looking at him which did not have any bandages or medication at the time you were talking to him.

[350] A. Well, they looked to be like—well, I have to say pick wounds. They were one on either side of his neck.

Q. Do you think an ice pick could make a wound like that?

A. Yes, sir.

Q. How about his stomach?

A. They looked the same.

Q. Did you see any blood on him?

A. Yes, sir.

Q. Where did you see the blood?

A. The blood was in an area around his chest (indicating). There were little drops of blood on either side on his neck (indicating).

Q. And by little drops of blood, you mean oozing drops of blood?

A. Probably, yes, sir.

Q. Now you say when you first went in there, and I am quoting you directly, if I may, and correct me if I am wrong, when Mr. Flannery was asking you a question, you said you first asked him his name; is that right?

A. Yes, sir.

Q. What did he say?

A. He gave me his name.

Q. And then what was the second thing you said to him?

A. Well, as near as I can remember, I asked him what [351] happened.

Q. So that was the second thing you did. Do you recall

the third thing you said to him? I take it between the second and third, he gave you this conversation you had?

A. Yes, sir, he talked quite a while there.

Q. And before you asked him the third thing, did you display any evidence to him at all, any objects?

A. No, sir.

Q. And then after he gave this explanation, what was the next thing you said to him?

A. I don't exactly recall the last thing I told him.

Q. No, I don't mean the last; I said the next.

A. The next. Well, I couldn't tell you in sequence how he explained.

Q. Have you told us now substantially everything that you told him during the 10 minutes you were there?

A. Well, when I first come in the room, I told him who I was.

Q. Oh, well now, then, wait a minute. Was that the first thing you said to him, then?

A. I can't recall that.

Q. Didn't you testify to him and to me that the first thing you said, and you used the word first, f-i-r-s-t, was to ask him his name?

A. I believe so.

[352] Q. And didn't you tell use the second thing you told him, s-e-c-o-n-d, was tell me what happened and then he told you his version of it?

A. I don't recall the exact words I used.

Q. No, I didn't ask you for the exact words. We are not concerned with the exact words. We are concerned now with first, second, the sequence of the things you said to him. Of course, I am going to get to ask you the question why didn't you identify yourself and say you are a policeman before you asked him his name and before you asked him to tell what happened.

A. Well, I didn't know when I went in there if he was the man involved in the fire or not.

Q. Okay. When you came to the hospital—you are now coming into the hospital—you went toward the emergency room, didn't you?

A. That is right.

Q. You have been there many times; right?

A. Many times.

Q. How did you happen to go to this man who was in a room there laying down?

A. I asked where Mr. Green was.

Q. Right. Now at the time you asked for Mr. Green, you knew who you were looking for, the Mr. Green that was taken from that fire in the house at Massachusetts [353] Avenue; right?

A. Yes, sir.

Q. And they told you?

A. I don't know who told me.

Q. Whoever it was, someone told you in that room; right?

A. Yes.

Q. So that as you walked in, you knew that that was the Mr. Green, because you had just been told it; right?

A. That is right.

Q. Now my question is: Why didn't you tell him I am a policeman, first?

A. I don't recall whether I told him I was an officer first or asked him his name first. I asked, "Mr. Green, what is your full name?" and then I told him, "I'm Sergeant Couture from the Homicide Squad."

Q. So that at this time now, would you want to change the statement you made to Mr. Flannery and to me before that the first thing you said to him was what is your name? It could have been that you said what, that I'm a policeman and you didn't say first what is your name?

A. No, I asked him who he was first, what his name was first.

Q. Then you told us the second thing you did is tell us about the fire. Why didn't you at that time tell him who you were, a police officer?

[354] A. I told him right at the beginning that I was a police officer before he ever explained anything about the fire.

Q. So then if you did it at the beginning, you now say that is the first thing you said to him?

A. I don't know whether I asked him his name first, whether I gave him my name or who I was first.

Q. Well now, you said you are sure of that at the beginning. Now the beginning means first; there is nothing ahead of beginning, is there?

When did you show him at any time your badge, or did you?

A. I don't recall showing him my badge.

Q. Well, don't you in these cases when you go to examine a man carry a badge; all detectives carry a badge, and don't you take it and say my name is so and so, I'm a policeman or something?

A. When I went to Emergency Hospital, I didn't know anything about the facts of the fire. I went to see Mr. Green to find out what happened. I didn't know him, didn't know what had happened at all, and there was no reason to tell him I was a policeman, because I didn't know what he was going to tell me.

Q. All right, if you felt there was no reason to tell him you're a policeman and you didn't tell him, just let's estab-
[355] lish that.

A. No, I told him who I was, but at the time I went in there——

Q. By the way, did you ever tell him. Now, Mr. Green, I am going to ask you a few questions and I want you to know that any answers you may give me may or may not, as the case may be, be used against you; did you tell him that?

A. No, sir.

Q. Did you at any time tell him what his rights may be?

A. No, sir.

Q. During the 15 minutes that you were there, you say nobody attended any of his wounds and there was no evidence that he had been attended to?

A. Not that I can recall.

Q. And you say that condition existed between 8:30 and 8:45?

A. I don't know whether I left there before 8:45 or not; I may have been gone from there. I think I was back in the hospital about 10:00 o'clock that same morning.

Q. Now you also told us that there were some nurses coming in and out of the room while you were there talking to him. How many?

A. I don't recall who was on duty or how many were on duty at the time.

Q. Of course, all the nurses would be on duty. I was
[356] not asking you who was on duty. I was asking you who were the nurses that came in and out of that particular room, because that is the only part of the hospital we are concerned with now.

A. I don't know. I can't remember who was on duty.

Q. Would you say there many or few?

A. That I can't say.

Q. And did any of the nurses come over to this man who was there, Mr. Green, laying on the bed?

A. They may have, yes, sir.

Q. You say they may have. Did you see them do anything, administer to him or give him a drink of water or any medication on his wounds or carry any bandages of any kind?

A. That I can't recall.

Q. So that as far as your recollection, therefore, is concerned now, they could have been attending to him while——

A. Not while I was talking to him, no, sir, they were not.

Q. Then you do recall that they did not do these things while you were talking to him?

A. Not while I was talking to him, no, sir.

Q. What did they do when the nurses came in the room, in addition to these doctors, during these 15 minutes?

A. I don't know what they did.

Q. Did you see what they did?

[357] A. No, sir. I wasn't paying any attention to them. I was talking to Mr. Green.

Q. But you were paying attention enough to know they were persons and that they were nurses and they were doctors and that they came in and they went out, even though you were talking to Mr. Green; right?

A. That is right.

Q. And at no time did they come up or say anything to Mr. Green or in any way attend to him while you were there?

A. Not for the few minutes that I talked to him.

Q. Now when you were going in to see him, were you concerned with whether or not he was in a physical or mental shape for you to talk to when you went in the room at 8:30?

A. I didn't ask anybody whether he was able to or was in condition to talk to. When I asked his name and he gave me his name, I assumed that he was in condition to talk.

Q. In other words, the fact that they gave you his name, you assumed from that he was in condition to talk?

A. The fact that he gave me his name.

Q. I am talking about before you went into the room.

A. I did not ask.

Q. Did you look at the card they made out there at the desk and see what it was that they had him in there for?

A. No, sir.

Q. Didn't you know then that he had been taken there [358] within one hour of your seeing him suffering from the inhalation of smoke?

A. That is possible. I didn't know about it at the time.

Q. Well, let's see. Who did you get the name from at the scene?

A. I am not sure, but I think it was from Mr. Kelly, but I am not too sure.

Q. The fire inspector; right?

A. Yes, sir.

Q. What was the conversation you had with Kelly right then?

A. Just as we arrived on the scene, Sergeant Clarke and myself got out of the car and we were met in the yard by Mr. Kelly, and he told us at that time that one of the persons that lived in the building had been pronounced, and another one by the name of Green had gone to the hospital, and that was all I knew about it.

Q. Now when Kelly told you he went to the hospital you knew that they wouldn't be taking him to a hospital unless he needed hospitalization, didn't you?

A. Well, that is generally the reason, yes, sir.

Q. And did you see the blood on his chest and on his neck as soon as you walked up to where he was and before you asked him to tell you what happened; did you actually [359] see those things?

A. Yes, sir.

Q. And did you actually see the blood on him at the time just prior to the time you are asking him to tell you what happened; you saw that blood on him?

A. I did.

Q. And didn't you believe that that was blood coming from his body or did come from his body, that he was in some way injured; didn't the blood indicate that to you?

A. That he had been injured?

Q. Yes.

A. Yes, sir.

Q. And you knew that he was carried there just an hour before, didn't you?

A. Yes, sir.

Mr. FORD: I have no further questions.

Mr. FLANNERY: Your Honor, I might as well point to another matter. This officer came back at 10:00 o'clock that same day and talked to this defendant again——

Mr. FORD: We challenge that, Your Honor, too, if it is within two hours of the occurrence.

Mr. FLANNERY: —along with Sergeant Clarke.

Would Your Honor like me to go into that?

The COURT: Yes, let us hear what he has to say about that.

[360] By Mr. FLANNERY:

Q. Now then, after you asked this defendant as you have testified, around 8:30 or so that morning, where did you go from there?

A. I returned to the scene of the fire.

Q. And at the scene of the fire did you gain certain information?

A. That I did.

Q. And armed with that information, did you have occasion to return to Emergency Hospital?

A. Yes, sir.

Q. Did you return with someone?

A. Yes, sir, with Sergeant Clarke.

Q. Of the Homicide Squad?

A. Yes, sir.

Q. What time did you go back to Emergency Hospital?

A. It was about 10:00 o'clock.

Q. When you went back to Emergency Hospital, did you see——

Mr. FORD: May I interrupt you a minute to get something clear? Did I understand that Sergeant Clarke was with him on the first time also?

Mr. FLANNERY: No, the second time.

Mr. FORD: So that he was by himself on his first occasion of 8:30?

[361] The WITNESS: That is correct.

Mr. FORD: I just wanted to clear it up.

By Mr. FLANNERY:

Q. The second time, Sergeant Clarke was with you and you arrived at the hospital about 10:00 o'clock?

A. About 10:00 o'clock, yes, sir.

Q. Where did you talk to Green that time?

A. He was in the same room.

Q. Was he still laying down there?

A. He was.

Q. What was his physical condition at that time as far as you could ascertain?

A. Well, it seemed to be about the same. He talked good.

Q. He talked good?

A. And he was lying on his back.

Q. Lying on his back?

A. Yes, sir.

The COURT: Was he in custody at that time?

The WITNESS: There were no officers there, no, sir, just myself and Sergeant Clarke.

By Mr. FLANNERY:

Q. Did you have additional information this time when you went back in connection with this fire?

A. Yes, sir.

[362] Q. Will you please relate what you said to the defendant and what Sergeant Clarke said in your presence so far as you can remember and what the defendant said to you?

A. Well, first, as I recall, asked him about five different fires that had been found by the firemen, and he said he didn't know about that. I asked him who removed the one-inch plug from the gas main, and he says the nigger must have done it.

Q. What else?

A. Also, I asked him—

Mr. FORD: Just a minute. Your Honor, may we approach the bench? I think it is good for me to do it at this time.

(At the bench:)

Mr. FORD: I have no objection to the expression, nigger, as he is using it now. However, we will object to him using it in front of the jury, which has several colored people on it,

because it would do nothing except possibly raise any prejudice of some kind by the use of that term of derogation, which we want to avoid. I just want to make the observation now, in that there are five or six people—

The COURT: He has to tell what he heard. He can't change that.

Mr. FORD: I understand. I believe certain conversations can be eliminated without the requirement that all of it [363] comes in, and that is what that would do. I know what that term will do. It is a pretty bad term of derogation, and we have at least five colored people on this jury.

Mr. FLANNERY: It is unfortunate, because accidentally the remark might harm the defendant, but if he said it, it is just too bad. It is evidence in the case.

Mr. FORD: But the most important thing, most superior to every consideration, is the fact that the jury bring in a verdict which is in no way prejudiced by any feeling. That is far superior to the police or anything. Where there is a conflict of those two things, that principle must survive; one must give way, and the surviving principle is that they should never, any jury, for us or against us, it makes no difference, bring in a verdict prejudiced by any feeling.

Mr. FLANNERY: I don't want to see this fellow prejudiced, but it seems to me it is evidence in the case, Your Honor.

Mr. FORD: Now I will tell you, in addition, why. Mr. Blow has just shown me, on Page 171 of the official record of this trial had before Judge McLaughlin February 9 and 10, 1954, this witness did not say he used the word nigger, but, on the contrary, he said, "He says that the colored man must have set them." So that at his previous testimony, he used the word colored and not the word nigger. And that is an official transcript.

[364] Mr. FLANNERY: He said he heard it. I don't know what he heard. I wasn't there. I don't want to see the defendant prejudiced, either.

Mr. FORD: I know you don't.

Mr. FLANNERY: I want to give him a fair trial.

Mr. FORD: But there it is. There is the official transcript.

Mr. FLANNERY: My recollection is that down at the morgue that offensive word was used. This is the testimony at the last trial.

Mr. FORD: No doubt about it.

Mr. FLANNERY: But at the morgue, I think something along those lines was said.

The COURT: Well, all I can say is he will have to tell what he heard. He can't tell anything else except what he did hear.

Mr. FORD: I agree, and that is what he was doing here on Page 171.

The COURT: Perhaps, Mr. Flannery, it might be well to tell him that at the other hearing he used the term colored man.

Mr. FORD: And at the morgue, Your Honor, I have the testimony at the morgue, which shows the word he used was colored man at the morgue.

The COURT: Is it agreeable with counsel for the defend-
[365] ant that Mr. Flannery tell the witness that he had heretofore used the term colored man?

Mr. FORD: Yes, Your Honor, it certainly is.

The COURT: Then I suggest you do that.

Mr. FORD: What he repeats to Mr. Flannery is that his recollection is that he did use the word nigger. Therefore, we have nothing to say about it at all; we withdraw our request, but I will certainly use these sworn statements on him. So we withdraw it, Your Honor.

The COURT: You would ask in substance or something like that.

(In open court:)

By Mr. FLANNERY:

Q. Let's see, I believe we reached a point in your testimony where you said that you and Sergeant Clarke had gone back to Emergency Hospital about 10:00 o'clock.

A. That is right.

Q. Now proceed with what you say that this defendant said in connection with this incident.

A. We asked him if on his way downstairs from the second floor he stopped on the first floor and warned Miss Brown about there being a fire in the basement, and he said no. Also at Emergency Hospital, on the floor alongside of this examining table he was lying on, there was an undershirt. We picked up the undershirt and looked to see if there were any holes in it made by any instrument, and there was
[366] none. And we asked Mr. Green how he could explain

the wounds in his chest when the undershirt would naturally cover it. The undershirt had been cut to one side when it was taken off of him. And he didn't explain that.

Q. Was there any other questioning there at that time or does that cover it?

A. Well, Sergeant Clarke asked him several other questions there that I just can not recall.

Q. Did he ask about the ice pick and the wrench?

A. Yes, Sergeant Clarke asked him about that.

Q. Did he ask about some stationery?

A. Yes, there were some remarks made about stationery.

Q. What was that?

A. In regards to had he been writing any letters.

Q. What did he say?

A. He said no, he had not.

Q. At the time that you and Sergeant Clarke talked to him, had you taken him or Sergeant Clarke taken him into custody?

A. I don't recall whether the policeman had arrived at that time or not.

Q. Were there any other policemen there at the time you started to talk to him until the time you concluded this interview?

[367] A. I believe Sergeant Clarke and myself were the only two officers in the hospital at the time.

Q. When you left, what time was it?

A. I don't know how long we were there that time. I don't remember how long we were at the hospital.

Q. When you left the hospital, did you leave any instructions relative to him being taken in custody or transferred to the strong room at Gallinger?

A. Not to be transferred; we didn't know whether he would be admitted or not, but if he was to be admitted to the hospital, we requested No. 3 to place a guard on him.

Mr. FLANNERY: Your witness.

By Mr. FORD:

Q. Who decided that he be transferred to a hospital rather than a precinct or the jail?

A. I believe that would be the doctors at Emergency.

Q. And they had him transferred to a hospital rather than to send him to jail because he was a person who physically needed medical attention?

Mr. FLANNERY: He wouldn't know that.
The COURT: Sustained.

By Mr. FORD:

Q. Were you there at the time?
A. No, sir, I was not.
Q. Now you have no feeling against Mr. Green, have you?
[368] A. No, sir.
Q. In any way.
And you have no feeling that would prompt you to use any particular type of words that might be injurious to Mr. Green in front of a jury which contains some colored people, would you?
A. No, sir.
Q. Now when you testified here, you said that Mr. Green, in answer to your question, said it must have been a nigger.
A. It must have been the.
Q. How?
A. The, the nigger.
Q. The nigger. And the word I direct your attention to is n-i-g-g-e-r.
Now you remember testifying down at the morgue, don't you?
A. Yes, sir.
Q. And you testified under oath, didn't you?
A. Yes, sir.
Q. And did you use your notes down there, either to refresh your recollection, while you were testifying, or not?
A. I do not recall. It was just a couple days after the incident happened.
Q. Now two years have transpired since this occurrence.
[369-374] A. Yes, sir.
Q. And you testified down there under oath on May 28, 1953, didn't you?
A. Yes, sir.
Q. Now that is but two days after you had the conversation with him. Now would you say your recollection was better at that time, on May 28, 1953, than it now is, two years later?
A. It was.
Q. And I will ask you whether or not under oath down at the hearing at the morgue you stated as follows, and I am reading from Page 46:

"He stated he went on down to the basement and when he got into the basement, he said the smoke was thicker down there, and he made out the form of a colored man."

A. That is what I said, yes, sir.

The COURT: Are you reading about the intreview at 8:15 to 8:45 in that?

Mr. FORD: Your Honor, I will just check that.

This is the 8:30 interview.

The COURT: Yes. We have been inquiring now about the interview at 10:00 o'clock.

Mr. FORD: I want to show that it is consistent throughout this one, and I am going right through the next one in one minute, Your Honor.

* * * * *

[375] By Mr. FORD:

Q. Now you came back at, I think you said, around 10:30 that same morning, wasn't it?

A. Yes, sir.

Q. That would be approximately an hour and a half?

A. It was about 10:00 o'clock, I believe.

Q. 10:00. That would make it approximately, say, an hour and fifteen minutes after your first visit that you came back to Emergency; right?

Now when you came back, Green was still in the emergency room, wasn't he? He wasn't taken to a room for patients; he was in the emergency room, wasn't he?

A. That is correct.

Q. Still there.

And as you walked in, was he still laying on the same furniture that he was laying on when you went there or was he in a bed?

A. No, I believe he was on the same table.

Q. And then how long did you spend in there on this trip, you and Sergeant Clarke?

A. I don't exactly remember how long. We were there some time.

Q. Were there any other patients in that emergency room when he was there on this occasion?

A. I don't recall. There was another table in there, [376] but I don't recall whether there was anyone on there or not.

Q. Were doctors and nurses coming in and out of that room while you were there?

A. I believe so.

Q. Were they in any way attending or assisting Mr. Green or did they approach him, any of the nurses or any of the doctors, at any of the times they came in or out?

A. I don't recall whether they did while we were talking to him.

Q. Now you walked up to him. Did you see on that occassion the wounds in his neck?

A. I did.

Q. Were they in the same condition as you had seen them before or did they have bandages and medication on them at that time?

A. That I can't remember whether he had been treated then or not.

Q. And as to the wounds on his stomach, at that time did you see any bandage on him or any medication on those wounds at that time?

A. I don't recall whether his stomach—whether his chest had been bandaged or not.

Q. So your answer is you don't know; right?

A. I don't know.

Q. Now at this time, did you ask any of those doctors [377] who were coming in and out, or did you look on the records, to see what his physical condition was prior to your——

A. I don't recall making any inquiries about his physical condition.

Q. Oh, by the way, on the first occasion, did you feel capable of determining his physical condition under the circumstances you saw as equally as well as a doctor?

A. No, sir.

Q. Did you have any stationery with you?

A. No, sir. Writing stationery?

Q. Yes. You spoke about some stationery; you had gone back.

A. Oh, the second time?

Q. Yes, the second time.

A. Sergeant Clarke asked him about some stationery.

Q. Yes, that is what I am talking about.

Did you have any with you?

A. No, sir. I don't recall that.
Q. Did you show any of it to him?
A. I don't know.
Q. Were you present when Kennedy said something about the stationery?
A. Kennedy?
Q. Kelly, the fire inspector.

The COURT: You mean Clarke?
[378] Mr. FORD: No, Your Honor. I mean the fire inspector who testified.
Mr. FLANNERY: It has not been demonstrated that the fire inspector was there.
Mr. FORD: He said that they went back—excuse me, that he went back and he received some information about the writing of a letter or stationery, that and some other facts, such as about the plug and that; then when they got that information from the fire inspector, they went back to the hospital to ask him about those new things which they found out, which they did not know at 8:30. Am I right or wrong?
The WITNESS: I did not know. Sergeant Clarke wasn't with me the first time.

By Mr. FORD:

Q. When you left the hospital the first time, did you go back to the scene?
A. That is right.
Q. Did you see Clarke?
A. Yes, sir.
Q. Did you see the fire inspector?
A. Yes, sir.
Q. Did all three of you have a conversation regarding stationery?
A. Not the three of us, no, sir. I didn't know anything about the stationery.
[379] Q. You mean Inspector Kelly didn't say anything to you about the——
A. Not that I recall.
Q. Wait a minute—either to you or in your presence to Sergeant Clarke while you were standing there about any stationery?
A. Yes, he may have done that, but I don't recall. I

don't recall the conversation we had with Mr. Kelly the second time. I talked to Clarke mostly.

Q. Weren't you present after you had left Emergency Hospital, weren't you present—by the way, after you left Emergency Hospital and before you came back at 10:00 o'clock, weren't you present when Clarke and Kelly had a conversation about stationery?

A. I don't recall being present.

Q. At the time you went back to Emergency Hospital the second time, did you have any knowledge of any kind from anyone about any stationery?

A. I heard Sergeant Clarke ask Mr. Green about stationery.

Q. You see, my question was, before you went back there.

A. No.

Q. Before you talked to Green.

A. I don't recall.

[380] Q. During both of your conversations, was the defendant, Green, always in a position where he was laying on his back?

A. Well, I don't recall whether he sat up any time or not. The most I can remember is that he was lying on his back.

Q. So your best recollection is that during both conversations, he at all times was laying on his back; is that right?

A. As I remember.

Q. That is what you are telling us all morning, what you remember, isn't it? You mean, by using that expression now, you want to qualify?

A. No, sir.

Mr. FORD: I have no further questions, Your Honor.

Mr. FLANNERY: I have none, Your Honor.

Mr. FORD: We object to both conversations being admitted in evidence and presented to the jury because of the admitted and non controverted physical facts, and we think it is a matter for the Court, Your Honor, as they have done in some of these cases which they have reversed. They said we decide as a matter of law certain facts, and the Court should rule on it, and we say the time element, No. 1. We have fixed his condition, what he went for. We have the records which he has introduced from Emergency Hospital showing his condition, showing his treat-

ment, the undisputed fact that he has blood, and so far [381] as his testimony is concerned, the additional fact he has questioned him even before he has even received any relief or medication for any of these wounds, because he said there were no bandages, no sign of any medication at the time, he said.

The physical facts that are in this case, including the record of the hospital, show that this person was not in a condition, both physically and mentally, to fully appreciate the giving of a voluntary statement to the officer, and we, for those reasons, think that those conversations of those particular dates should be excluded from the jury's consideration as not being purely voluntary.

The COURT: The motion is denied. The Court thinks the jury should hear the evidence and weigh it in connection with all other facts and circumstances shown in the case and determine whether or not the statements were made and, if made, whether they were voluntary in character.

Mr. FORD: Your Honor, I overlooked one question, and I am not doing this now that Your Honor has given his decision.

The COURT: No, that is all right.

By Mr. FORD:

Q. I understood you to say that when you went back there at 10:00 o'clock, that he was not in police custody because there was no policeman there; right? Is that correct?

[382] A. That is right.

Q. That he was not in police custody when you went there at 10:00 o'clock to Emergency Hospital, the second visit; is that right?

A. That is right.

Q. And I also understand that you said that at the 8:30 visit, you called No. 3 and asked them to send a policeman, and so that within that hour and a half—did you tell them what you wanted them to send him for, that you wanted a man taken into custody or guarded in relation to a fire and a death?

A. Yes, sir.

Q. And they didn't send a policeman in that hour and a half, from 8:30 to 10:00, to guard him?

A. They did not.

The COURT: Gentlemen, we will take a recess for 10 minutes and then call the jury back.

(Whereupon, a short recess was taken.)

(At this point, the jurors returned to the courtroom, and the following proceedings were had in the presence of the jury:)

Thereupon——

LIONEL COUTURE resumed the witness stand, and having previously been duly sworn, was examined and testified further as follows:

[383] DIRECT EXAMINATION (resumed)

By Mr. FLANNERY:

Q. Sergeant Couture, in connection with your duties as a member of the Homicide Squad of the Metropolitan Police Department, did you on May 26, 1953 have occasion to go to premises 1115 Massachusetts Avenue, Northwest?

A. I did.

Q. What time did you arrive there?

A. Sometime between 8:30 and 8:45, in the A. M.

Q. Was that at 1115 Massachusetts Avenue, Northwest?

A. That is right.

Q. A. M. or P. M.?

A. A. M.

Q. With whom did you go to the premises?

A. I went there with Sergeant Clarke.

Q. When you arrived there, what did you do; no conversation with anyone, but what did you do?

A. I observed an ambulance litter on the lawn, and there was the body of a white woman there; I could see her head; she was covered, and after receiving information, I left there.

Q. Where did you go when you left there?

A. I went to Emergency Hospital.

Q. What time did you arrive at Emergency Hospital?

A. Well, it was just shortly before 9:00, between 8:45 and 9:00.

[384] Q. When you arrived at Emergency Hospital, to what part of the hospital did you go?

A. I went to the emergency room.

Q. If you recall, where is that in Emergency Hospital?

A. As you come in the front door, the emergency room is back about middleway and to your right is the emergency room.

Q. When you arrived in the emergency room, did you see the defendant in this case, Green?

A. He wasn't in the emergency room. He was in what you call an examining room, a little bit to one side of the emergency room.

Q. When you saw Green, the defendant in this case, what was he doing?

A. He was lying on an examining table in one of the examining rooms.

Q. Was anyone else in the room at that time?

A. Not when I went in.

Q. Did you observe Green as to his physical condition?

A. Well, he was conscious and he talked to me.

Q. Did you see any wounds on his person?

A. I did.

Q. What did you see?

A. There was a wound on either side of his neck (indicating), and there were several wounds in his chest (indi-
[385] cating), in an area around his chest, right around his chest bone.

Q. What did you say when you went in there; what did you say to Green?

A. I asked him what his name was.

Q. What did he say to you in response to that?

A. He told me Everett D. Green.

Q. Did you identify yourself?

A. I told him I was from the Homicide Squad.

Q. At that time when you went there, did you know any of the facts and circumstances surrounding what had occurred at 1115 Massachusetts Avenue, Northwest?

A. The only thing I knew was that someone had perished in the fire.

Q. Did you then question the defendant Green relative to this fire?

A. I did.

Q. Will you please relate to His Honor and to the jury the substance of that questioning?

A. I asked Mr. Green what had occurred, and he told me that he had went to bed about midnight the night before, and he woke up around 7:00 o'clock, and when he woke up, he detected an odor of smoke. He said he went down the stairs. He did not stop at the first floor, where Miss Brown was sleeping off to one room, but he went on down [386] to the basement. He said when he got in the basement, it was full of smoke, and he thinks he went to the bathroom and turned on the light; he wasn't sure, but he said he thought he turned on the light in the bathroom. He saw the form of a colored man standing in the smoke. He asked the man what he was doing, and the man came after him with a long dagger. He said the man stabbed him twice in the neck and in the chest several times. He said then he broke away and he disappeared in the smoke, and he didn't know where he went to or how he got out of the house. He said the next thing he knew, the firemen were taking him out of the house or the firemen were in the house.

I asked him to describe this colored man, and he told me he was about six foot tall, real dark-skinned, with a shiny bald head, and he weighed about 200 to 225 pounds and had on work clothes.

Q. Is that the substance of what he told you at that time?

A. I asked him some questions about Miss Brown, who her relatives were, and questions pertaining to Miss Brown.

Q. Then what did he say in regard to that?

A. Well, he said that she had a niece or nephew, I do not recall exactly what, in Fredericksburg, Virginia, that we could notify them of her death.

Q. What did you do after that?

A. I returned back to the scene and I picked up Sergeant [387] Clarke and got together with him.

Q. Now don't relate any conversation you might have had with Sergeant Clarke or anyone else, but on returning to the scene, did you gain certain information which you did not have when you went to Emergency Hospital the first time?

A. I did.

Q. Now after you received that additional information,

did there come a time when you went to Emergency Hospital again?

A. Yes, sir.

Q. With whom did you go?

A. I went with Sergeant Clarke.

Q. What time did you arrive at Emergency Hospital the second time?

A. It was right pretty near 10:00 o'clock, just a few minutes before or after, I am not sure, but right near 10:00 o'clock a. m.

Q. And Sergeant Clarke was with you?

A. Yes, sir.

Q. At that time, to what part of the hospital did you go?

A. We went back to the same room where I had left Mr. Green previously.

Q. What was Mr. Green doing at that time around 10:00 o'clock?

[388] A. He was still lying on this table, lying on his back.

Q. Now you have said 10:00 o'clock. Do you mean A. M.?

A. A. M.

Q. Did you have a conversation with Mr. Green at that time at 10:00 o'clock?

A. Yes, sir, we both did, Sergeant Clarke and myself.

Q. Please give, if you will, the substance of that conversation.

A. Well, I asked Mr. Green how he explains the five fires that were found by the firemen about the premises, and he says the colored man must have set them.

Asked him how he explains that firemen and the police had to break in all the doors, that all the doors were accounted for, and he didn't know, he didn't know how the man got out.

Also asked him how he explains a one-inch plug that was found removed from a gas main, and he said the colored man must have done it.

Also there was a shirt lying on the floor alongside of this table where he was lying, and it had been cut to one side, and there were several blood stains on it. I asked Mr. Green how he accounted for no stab wounds over the area over the chest (indicating) in the undershirt, and he didn't explain that.

[389] Q. Did you ask him anything else or did Sergeant Clarke ask him anything else in your presence?

A. Well, he was asked several other questions; I don't recall exactly all what we asked him then.

Q. Do you recall what Sergeant Clarke asked him?

A. Yes. Asked him about some stationery that he had seen. He asked him whether he had written any letters that evening.

Q. What did Green say to that?

A. He said no.

Q. Now, Sergeant Couture, have you given us the substance of that convesation at 10:00 o'clock?

A. Yes, sir.

Q. Now then, directing your attention to the following day, which would be May 27, 1953, did you have occasion to see Lieutenant Bryant of the Metropolitan Police Force on that day?

A. I did.

Q. Without relating any conversation, did anything transpire between you and Lieutenant Bryant?

A. Yes. It was about 10:30, I believe, in the evening, May 27th, that I went to No. 8 Precinct and talked to Lieutenant Bryant, and as a result, I received a letter.

Q. From Lieutenant Bryant?

A. From Lieutenant Bryant.

[390] Q. I will show this envelope and its contents, the envelope being known as Government's Exhibit No. 4 and this piece of paper-writing being known as Government's Exhibit No. 4-A. I will ask you to look at those two exhibits and tell me, is that the letter that you just referred to?

A. That is the letter.

Q. And you identify that how?

A. I wrote my initials in the top left-hand corner of the envelope. I also put detective bureau number on here and my name typed in.

Q. Did you mark——

A. The letter also——

Q. The letter also?

A. —with a number, and I just have my name there.

Mr. Ford: We have already stipulated that the defendant Green wrote that letter.

Mr. Flannery: I know he did.

By Mr. FLANNERY:

Q. Now after you got this letter into your possession, did there come a time subsequent to that when you talked to the defendant Green?

A. Yes, sir.

Q. And when was that?

A. That was about 9:30 a. m., on the morning of the 28th, and that was at D. C. General Hospital in the locked ward.

[391] The COURT: What date was that?

The WITNESS: On the 28th, sir.

By Mr. FLANNERY:

Q. May 28th, 1953?

A. May 28th.

Q. At 9:30 a. m., you say?

A. That is right.

Q. Now who went to the District of Columbia General Hospital with you at that time on that date?

A. Well, at that time, Mr. Kelly from the Fire Marshal's office and Sergeant Clarke were with me.

Q. Did you have this letter, Government Exhibits 4 and 4-A, in your possession at that time?

A. I did.

Q. Did you question the defendant Green at that time?

A. I did.

Q. Will you please relate the substance of what Green told you at that time?

A. Well, he told me that morning that he had written that letter just prior to his detecting the odor of smoke and mailed it.

Q. What else did he tell you?

A. Well, he was questioned again about the five fires and also about the gas plug, and he said the same thing, that he thought the colored man must have done it, and I [392] asked him about some cartridges that I had seen in the front room.

Q. Some cartridges?

A. Bullets. There was a box of .45 calibre cartridges in a dresser drawer on the second floor front bedroom. I asked Mr. Green if he had a gun for that, and he said no. I asked him why he had the shells and he said——

Mr. FORD: We are going to object to this, if Your Honor please, on the very ground that this case does not involve any killing by any guns or any bullets of any kind. It is not that kind of a case.

The COURT: Objection overruled. You may answer.

The WITNESS: He said that before he would let those people get the house, he would blow the so-and-so place up and then blow his brains out; he would get a gun to fit the shells. He said he did not have a gun, but he would buy a gun to fit the shells and blow up this place and then blow his brains out.

By Mr. FLANNERY:

Q. You made reference to an undershirt of the defendant's.

A. Yes, sir.

Q. When did you say had seen that?

A. That was at Emergency Hospital on the floor alongside of the table that Mr. Green was on.

Q. Did you do anything in connection with that undershirt?

[393]

A. Sergeant Clarke put his initials on it and brought it in to the property clerk.

Q. Sergeant Clarke took care of that?

A. That is right.

Mr. FLANNERY: I believe that is all I have.

CROSS EXAMINATION

By Mr. FORD:

Q. Did you testify a few minutes ago that you made a visit to the District General Hospital? Now that is Gallinger Hospital, isn't it, way out on 19th Street, Southeast; right?

A. That is right.

Q. Emergency Hospital you referred to is up on 17th Street and New York Avenue, Northwest; is that right?

A. That is right.

Q. There are miles that separate those two points; they couldn't become confused, could they?

A. That is right.

Q. Did I understand you to say that on the 27th you visited Gallinger?

A. No, sir.

Q. On the 28th?

A. On the 28th.

Q. And who did you say was with you when you visited Gallinger Hospital on the 28th?

[394] A. Sergeant Clarke and——

The COURT: Did he say Gallinger?

The WITNESS: I may have said D. C. General.

Mr. FORD: I think he said Gallinger, now known as District General. There is a change of name between them. I guess we can agree we are talking about the same place.

The COURT: Yes, I think the jury may understand that.

By Mr. FORD:

Q. Okay, there is a change of name. It went from Gallinger to the District General, but it is the same thing.

Did you say who went with you?

A. Sergeant Clarke and Mr. Kelly, from the Fire Marshal's office.

Q. Is Mr. Kelly here?

The COURT: We excused him a while ago.

Mr. FORD: Yes, but I saw him here this morning. He approached me, Your Honor. That is how I happen to know he is here.

The WITNESS: It is the same Mr. Kelly.

Mr. FORD: Wait, you don't need to get him. What I want to know is, that is the fire inspector who testified here; I just want to make sure?

The WITNESS: That is right.

By Mr. FORD:

[395] Q. And you say he went with you and Clarke, and that you and Clarke accompanied him to the General Hospital to what you call—what did you call the room?

A. To the locked ward.

Q. The locked ward; on the 28th?

A. That is right.

Q. And that he, that same Kelly, was with you when you were questioning Mr. Green?

A. He was.

Q. And was Fire Marshal Roberts with you?

A. Not at that time, no, sir.

Q. That is what I am talking about.

A. No, sir.

Q. You are sure of that?

A. I am positive.

Q. Okay.

Now let's go back to the first time when you went to Emergency Hospital. You say you got there about 8:30?

A. Yes, sir.

Q. You walked in the hospital; you are by yourself?

A. Yes, sir.

Q. And you went to the emergency room?

A. That is right.

Q. And this emergency room in the Emergency Hospital is a room where they treat patients who are carried in there who are injured, like from accidents,—just what it means, [396] emergency; right?

A. Exactly.

Q. And then after they get through treating them as best they can, the doctors, they are transferred to what we know as patients' rooms, where you take them up where the patients are to recuperate; right?

A. Well, sometimes. Sometimes they are kept under observation for so many hours in the emergency room and then released directly.

Q. Now at this time you went there to talk to Mr. Green at 8:30 a. m., on May 26th, he at that time was laying on his back, wasn't he?

A. That is right.

Q. And he was on a table; right?

A. Right.

Q. Now that you know to be a treatment table?

A. Examination table I think they call it.

Q. They treat you for gunshot wounds, broken arms, bones and what-not; right? And they treat you there, don't they?

A. Yes, sir.

Q. Now he is in this room, and you recognize that as being that type of a room for that purpose, don't you?

A. Yes, sir.

[397] Q. And as you walked up to him and he is laying on his back, you got close to him to get a look at him, didn't you?

A. Yes, sir.

Q. And as you looked at him—I am talking about before you questioned him now—you saw two wounds here in his neck (indicating), didn't you?

A. I did.

Q. Now at that time that you saw those wounds, they weren't in any way bandaged, were they?

A. No, sir.

Q. And at that time, they didn't have any medication on them at all, did they?

A. I don't recall whether they had any medication or not, but I know they weren't bandaged.

Q. Then he had wounds in his stomach (indicating)?

A. No, sir, they were up here in his chest (indicating).

Q. Excuse me, up here in his chest. You saw those?

A. Yes, sir.

Q. Now they didn't have any bandages on them?

A. No, sir.

Q. And did they have any medication on them?

I am trying to bring out if you got there to question him before or after he was treated. That is what I want to bring out.

[398] A. I didn't see any medication on him.

Q. Right.

And did you see any other wounds?

A. That is all I can remember, is the ones on his chest and on each side of his neck.

Q. How about one back here (indicating), where I am pointing, behind in his neck?

A. I don't recall one back there.

Q. Now, let's take his eyes. Did you see his eyes? Were they red or were they in any way running, which might indicate that smoke had affected them in any way, or were they just clear, for instance, as clear as mine are?

A. I can't remember whether his eyes were running or whether they were bloodshot or not.

Q. Then during this time you say you were questioning him, did doctors come in and out of that room?

A. Yes, sir.

Q. And nurses coming in and out of that room during the time you questioned him?

A. Yes, sir.

Q. Did you ask any doctor, after you had seen these conditions, after you had seen it was the emergency table—did you see any blood on him?

A. There was blood on his chest.

Q. Where did you see the blood?

[399] A. There was blood on his chest (indicating). There was a little blood on either side of his neck (indicating).

Q. You saw those, too, before you questioned him, didn't you?

A. Yes, sir.

Q. Now, knowing that that is an emergency room, as you saw, and having seen the blood and seen these injuries, did you ask any doctor if he was in fit condition to talk to and to give thoughtful and reasonable answers?

A. I did not ask anyone, no, sir.

Q. Anyone, that includes you didn't ask any nurses either; right?

A. I don't recall asking anyone.

Mr. Ford: Do you have those Emergency Hospital records?

By Mr. Ford:

Q. In your experience as a member of the Homicide Squad, you know that when a patient is brought into an emergency room, they have a card or a record they make of what is wrong with him; right?

A. Yes, sir.

Q. And did you go look at that in order to determine whether or not he was fit to talk to at that time or whether you should talk to him later, the next day or that evening?

A. No, I don't recall asking any questions about that.

[400] Q. Then you came back—that was at 8:30—you came back an hour later or about an hour and a half later, which would be about 10:00 o'clock the same day?

A. Yes.

Q. Now when you came in there with Sergeant Clarke, he was still in the emergency room, wasn't he?

A. He was.

Q. And he was still on the same cot that he was when you saw him an hour and a half before?

A. He was.

Q. And did you still see those wounds in his neck and his chest?

A. I don't recall whether they had been covered then or not.

Q. Covered, by that do you mean bandaged?

A. Yes, sir.

Q. Now what is your best recollection?

A. I don't remember in what condition they were the second time I went to the hospital.

Q. So your recollection is, you found the same conditions existing so far as he is concerned, his location and physical as you did at 8:30, an hour and a half before; is that it?

A. Yes, sir.

Q. And you say you found a shirt there?

[401] A. There was a shirt lying on the floor right alongside of the stand he was lying on.

Q. When did you first see that shirt, when you went there at 8:30 or 10:00 o'clock?

A. I don't recall. I didn't pay any attention to it before.

Q. Before what?

A. The first time I went there.

Q. So that as far as the first time is concerned, you didn't see that shirt there?

A. I don't know. I didn't notice it.

Q. My question is, you didn't see it there at 8:30, did you?

A. I don't know whether I did or not. It might have been there all the time.

Q. You don't know whether you saw it or not?

A. Yes, sir.

Q. Then you said that that shirt was slit down the side, did you say?

A. Yes, sir.

Q. Do you mean from top to bottom?

A. That is right.

Q. So that it would unfold?

A. Right.

Q. Is that right?

[402] A. Yes.

Q. What did you ask him about that?

A. Why?

Q. No. What, if anything, did you ask him? You were looking at his shirt, and it is cut now down from top to

bottom. You are right there in the emergency room; Green is there. What did you ask him about that, about that shirt?

A. I asked him how could he account for no holes being in the chest part of the shirt here where there were holes in his chest, marks in his chest.

Q. What did you ask him about that cut you have been talking about?

A. I didn't ask him about that. I knew what that was.

Q. How did you know it?

A. Because that is a procedure in the hospital: they cut them off when the patient comes in the hospital.

Q. So you are testifying that it was cut and you knew it was cut because of the procedure, you know that they are going to cut it off?

A. To remove it from the patient, yes, sir.

Q. And you also know, do you not, as a custom, that they don't wait, if a patient is carried into that emergency room bleeding and with blood and with wounds that are visible, that they don't wait for an hour to put some medication or give some treatment to them, too, don't you?

[403] A. That is right.

Q. And did you inquire about that?

A. No, sir.

Q. Did you ask Mr. Green before you started questioning him, Are you suffering with any pain, Mr. Green, from any of these wounds?

A. I don't recall asking him anything like that.

Q. You didn't ask him anything about his physical condition, how he felt before you wanted to question him, did you?

A. No, sir.

Q. Then, as I understand you—excuse me if I repeat—you didn't know what they had written on his record?

A. No, sir.

Q. Did you know that he had been carried unconscious from Massachusetts Avenue just three-quarters of an hour before you had questioned him in that hospital; did you know that?

A. No, sir.

Q. And no one at the scene had told you?

A. No, sir.

Q. And yet it was at the scene that you found it was his name and that there was a man carried away to Emergency Hospital?

A. Yes, sir.

Q. But in telling you that he had been carried away, they [404] didn't tell you that he was unconscious?

A. They did not.

Q. Do you recall testifying on direct and making the following statement: Asked him about stationery he had seen''? Do you remember making that statement?

A. Well, I will put it this way. One of us asked him; I don't know whether it was myself or Sergeant Clarke.

Q. Okay. But is that what it was, asked him—you see, I am not saying who—asked him about stationery he had seen? Do you remember making that statement right here?

A. Yes. Sergeant Clarke asked that question, or had seen the stationery.

Q. What I am getting at is what you meant by he had seen the stationery.

A. That would be Sergeant Clarke had seen the stationery.

Q. That means at 10:00 o'clock, on May 26th, Sergeant Clarke, in Emergency Hospital, had made a statement to him that he, Sergeant Clarke, had seen stationery?

A. That is correct.

Q. Is that right?

A. That is right.

Q. Now when you went down with the fire inspector and Clarke to the room that you have described at the District General Hospital or Gallinger, where was Green in this room [405] and how did you get in there?

A. You have to be let in by an officer. There is an officer standing guard outside, and he lets you in the room.

Q. Did he do that on this occasion?

A. Yes, sir.

Q. And you and, you say, the fire inspector went in there?

A. That is right.

Q. Where was Green?

A. As I recall, he was on the last cot on the right-hand side of the room near the window; that would be to the farthest back in the room.

Q. In what position was he on the cot?

A. I think he was standing alongside the cot, along against the cot.

Q. When you say Green was standing, you don't mean

sitting on the side of the bed now—wait a minute, will you let me finish?

Mr. Flannery: Wait until he finishes his answer.

The Court: Finish your question.

By Mr. Ford:

Q. You do not mean that he was standing on the floor beside the bed; which do you mean now, you tell us?

A. He was standing on the floor and with his back against the bed.

[406] Q. Right, and as he stood with his feet on the floor and the fire inspector was there, was he in that position when you questioned him, standing on the floor with his back to the bed?

A. I don't remember whether he got in bed and laid down or sat on the side of the bed: I do not remember.

Q. You don't know one way or the other?

A. No, sir.

Q. Now this was the third time you had visited Mr. Green——

A. Right.

Q. —to question him and to get answers from him?

A. Yes, sir.

Q. Now, how long have you been on the Homicide Squad, Sergeant?

A. About eight years.

Q. And during that time in performing your duties, how many times would you say you have interviewed persons regarding—I am talking about your official duties now—regarding alleged crime?

A. That would be hard to say, sir.

Q. Well, is it many, let's put it that way?

A. Many, yes.

Q. And after you talk to them and they appear to voluntarily tell you, you take it down in writing, don't you?

[407] A. Yes, sir.

Q. As a matter of fact, that is done every day; right?

A. Yes, sir.

Q. And it is typed up in a statement, correct, in front of witnesses or police officers or whoever happens to be there, and then you give it to the person and ask him to read it, don't you?

A. That is when a defendant is brought to the office of the Homicide Squad, then a statement is taken from him, yes.

Q. So you mean that you only do it if you take them into the Homicide Squad?

A. No, sir.

Q. You have police officers and clerks that do all this, haven't you, who are provided the Homicide Squad?

A. Yes, sir.

Q. Did you take them down on any one of these three trips that you made and type down what he would say?

A. No, sir.

Q. And then ask him, is this it, and then ask him to sign; did you do that?

A. No, sir, that is never done that way.

Q. What is never done that way?

A. The way you explain it.

Q. To type it and take it down as he states it?

[408] A. Yes, but that is only done when the defendant is in the office of the Homicide Squad and it is taken down in typewritten form as he says it.

Q. So that no statements are taken away from headquarters; is that what you mean?

A. Not by our squad, no, sir.

Q. But your squad is what I am talking about and every member on it. They don't take written statements away from the squad room; is that right?

A. Unless someone is incarcerated in some other jurisdiction.

Q. You know they have done it, don't you, taken statements from witnesses who were not in headquarters? You positively know that that squad has done that many and many a time, do you not?

A. Not in homicide cases.

Q. I am talking about the Homicide Squad, yes, sir.

A. No, I don't recall of any.

Q. You don't recall any, and you have been on there how many years, sir?

A. Almost eight years.

Q. And was the fire inspector there all during this conversation that you had at Gallinger Hospital?

A. All three of us were together, yes, sir.

Q. And at no time was Fire Marshal Roberts there with [409] the fire inspector?

A. He wasn't there with us in the room at that time.

Q. That is what I am asking you about.

A. Not in that room, no, sir.

Q. That is the room I am talking about. I am talking about you and Sergeant Clarke.

A. No, sir.

* * * * *

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[410] ALFRED D. CLARKE, was called as a witness for the Government, and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. FLANNERY:

Q. Sergeant Clarke, please state your name.

A. Alfred D. Clarke.

Q. You are a member of the Metropolitan Police Force, attached to the Homicide Squad, are you not?

[411] A. I am, sir.

Q. Directing your attention to May 26, 1953, were you a member of the Metropolitan Police Force, attached to the Homicide Squad, on that date?

A. I was, sir.

Q. Directing your attention to that date, namely, May 26, 1953, did you have an occasion in connection with your duties to go to premises 1115 Massachusetts Avenue, Northwest, in the District of Columbia?

A. I did.

Q. What time did you go there?

A. Shortly after 8:00 o'clock in the morning. I would say it would be in the neighborhood of approximately 8:15 when I arrived.

Q. Did someone go with you?

A. Sergeant Couture, also of the Homicide Squad.

Q. When you arrived on the scene, what did you see and what did you do?

A. The fire apparatus was on the scene when we arrived. Walked into the front yard, which is a long front

yard, leading into the premises. On the left of the walkway going in I observed a carrier or a litter, and at that time I received the information from Inspector Kelly. I pulled the sheet down and observed the body of an elderly white woman, who at that time had been pronounced dead.

[412] Q. What did you do?

A. I then ordered the body to the D. C. Morgue. With that, I went into the basement premises with Inspector Kelly. Couture left us at this point.

Q. Couture left you?

A. Couture left at that point.

Q. You went in the basement?

A. At the basement door I met Chief Roberts, of the Fire Marshal's office, who handed me a wet towel, a Stiltson wrench and an ice pick.

* * * * *

[413-414] By Mr. FLANNERY:

Q. What did you do next, Sergeant Clarke?

A. As a result of information received at that time, I placed this Stiltson wrench over a one-inch gas plug that was located just inside the basement door and to the left. That Stiltson wrench was set where it exactly fitted this one-inch gas plug.

Q. And where was that gas plug?

A. That was just to the left as you come into the basement entrance.

* * * * *

[415] Q. Then did you have occasion to go in the kitchen at that time?

A. We went to the back portion of the house, and I came into that back portion, as I recall, through the back stairway into the kitchen, and in the kitchen we observed a table which had a cup and saucer set on the table. There was a box of writing paper which, as I recall, had the lid removed from it, a couple pencils and a pair of eyeglasses. There was also a box partly filled with paper matches. There was a pile of paper matches over on the stove. I believe that was a gas stove. That was located on the west side of that kitchen.

[416] Q. What did you do then?

A. Shortly after this examination, Sergeant Couture returned to—no, I first made inquiry around the neighborhood, and it was shortly after that that Sergeant Couture returned to the house, and as a result of information he gave me and that I gave him, we went back to Emergency Hospital. On my arrival at Emergency Hospital, I had a conversation with the defendant.

Q. What time did you arrive at Emergency Hospital?

A. That was sometime after 10:00 o'clock. It was approximately 10:15, 10:30.

Q. To what part in Emergency Hospital did you go?

A. Into the emergency room.

Q. Which was located on what floor of the hospital?

A. That would be to my left; it was on the first floor of the hospital; on the right as you come in the main entrance.

Q. When you entered the emergency room, did you see the defendant in this case, Green?

A. I did. I didn't see him immediately until I got back into what we would term as an operating room.

Q. But there did come a time when you saw him?

A. I did.

Q. When you saw him, where was he and what was he doing?

A. He was on a table, lying on a table, as I recall. When I first observed him, he had a patch through this section of his chest (indicating) that had been covered apparently [417] by the doctors or nurses at the hospital. I saw two small marks, one on either side of his throat (indicating), the type of mark that I would call a puncture wound, just a round hole on each side.

Q. Did you talk to him?

A. I did.

Mr. Ford: At this time, Your Honor, for the record, we make an objection to the conversation which is the 26th at 10:00 o'clock.

The Court: You may proceed. Objection overruled.

By Mr. Flannery:

Q. Did you identify yourself?

A. I did.

Q. Did you ask him some questions?

A. I did.

Q. And did he make some responses?

A. He did.

Q. Will you please give the substance of what you asked him and what he said to you?

A. At first I asked him about this Stiltson wrench and the ice pick. I asked him if these articles belonged to him.

Q. What did he say?

A. He couldn't identify either one. He said he had several Stiltson wrenches and he had two or three ice [418] picks. I asked him about whether or not he had opened the one-inch plug in the basement with the Stiltson wrench. He told me he had not, that the colored man must have.

I asked him about the writing paper that was on the kitchen table, as to whether or not he had written any notes during the evening before or the early morning. He said he had written none.

I also asked him about the United States marshal being at his premises the day before with a notice to set him out. He told me that he had been.

I asked him whether or not he had been to see quite a few people in an effort to borrow several hundred dollars to withhold the setting out. He told me that he had.

That was about the extent, as I recall, of the conversation I had with him at the emergency room.

Q. Did he say anything about his movements during the early morning hours of that day?

A. He told me that he got up somewhere around 7:00 o'clock in the morning. He first told me that he came down the front staircase, and at that time I stopped him and asked him whether or not he had gone into the room of the deceased to call her to get her out of there because he had smelled the smoke at that time. It was then that he changed his story and told me that he went down the back staircase and down into the basement and when he was going down the steps, he observed this tall colored man, [419] heavy-set, with a baldish head, and that this man came at him with a shiny bladed dagger, that he stuck him several times with it and finally left the dagger in him. He himself went into the bathroom, and in an effort to get air, because the smoke was becoming dense, climbed

into the bathtub and turned the water on in the bathtub. I believe he said something about the water later getting hot and he had to cut it off.

Q. Did he say anything else about what he did or what happened after that?

A. I don't recall anything further from then.

Q. Now going back for a moment to the time that you were in the house with Inspector Kelly and the time you were in the kitchen, did you find anything else in the kitchen?

A. A search was made of the kitchen for what we believed to be turpentine, because on entering the premises in the area of the fire, and I also got the same odor in the basement, there was a strong odor to me of turpentine; therefore, we looked for that turpentine, and Inspector Kelly found that bottle of turpentine in a dresser on the east wall of the kitchen.

Q. I will now show you what is known as Government Exhibit No. 5 for identification, a bottle. I will ask you, can you identify it?

A. Yes, sir, I can.

[420] By Mr. FLANNERY:

Q. Now then, Sergeant Clarke, did there come a time subsequent to the time about which you have just testified when you saw the defendant, Green, again?

A. There did.

Q. When was that?

A. On the morning of May 28th.

Q. What time?

A. About 9:30, we arrived there.

Q. Where?

A. At the D. C. General Hospital, in the locked ward.

Q. You say we arrived there. Who do you mean?

A. Inspector Kelly and Detective Sergeant Couture.

[421] Q. Where did you go; was it known as Gallinger General Hospital then?

A. It is the D. C. General Hospital. At that time it was known as Gallinger Hospital.

Q. When you arrived at that hospital, where did you go in the hospital?

A. We went directly to the second floor or to the locked ward.

Q. When you got there, did you see the defendant in this case, Everett Green?

A. I did.

Q. What was he doing when you arrived there?

The COURT: What date was it, Officer?

The WITNESS: This was on May 28th, about 9:30 a. m., when I arrived.

By Mr. FLANNERY:

Q. A. M.?

A. A. M.

Q. All right.

Mr. FORD: We are making no objections to this conversation, Your Honor, on the 28th.

The WITNESS: He was on the fourth bed, which would be the farthest bed on the north wall of the room, and it was at that time after we got there that we started a conversation with him, or Sergeant Couture almost immedi- [422] ately asked him to identify all that he had in his possession.

By Mr. FLANNERY:

Q. Let me interrupt you for a minute. I will show you what has been introduced into evidence as Government's Exhibit Nos. 4 and 4-A, namely, this envelope, which is 4, and this piece of paper writing, 4-A, and ask you, can you identify those?

A. Yes, sir. This is the envelope and the letter that was shown to him.

Q. Will you proceed, please, give the substance of what was said there by the defendant and by you or anyone else in your presence.

A. Mr. Green identified the letter as one which he had written to Mrs. Anthony. In response to a question by me, he gave me the time that he had written this letter as sometime around midnight. And at that time I asked him if the box of writing paper that I had also was his.

Q. You made reference to a box of writing paper. Did there come a time when you took into your possession a certain box of writing paper?

A. On the morning of May 28th.

Q. May 28th?

A. In company of Inspector Kelly.

Q. I will show you what has been marked as Government Exhibit No. 6 for identification, this box and its contents. [423] What is that?

A. This is the box of stationery that I removed from the kitchen table in the premises 1115 Massachusetts Avenue.

Q. Would you open the box a minute?

How do you identify that?

A. I made a notation here at 9:30 a. m., 5/28/53, made statement admitting writing letter.

Q. And you identify the box?

A. And he identified this as his paper.

Mr. FLANNERY: I will offer into evidence at this time, Your Honor, Government Exhibit No. 6 for identification, this box and its contents.

Mr. FORD: No objection.

The COURT: Government's Exhibit No. 6 is received.

(Government's Exhibit No. 6 is received in evidence.)

By Mr. FLANNERY:

Q. Now proceed, if you will, Sergeant Clarke, with the substance of what the defendant said there and you said and the other people with you said in your presence and the presence of the defendant.

A. He was asked about one of the statements in the letter that he had written, "We both want it this way." He was asked, as I recall, by Sergeant Couture in reference to that as to whether or not he and the deceased both knew about [424] this letter, whether or not he had talked this over with her or consulted her about it, and he said at that time that he had not discussed it with her, that she knew nothing of the letter.

Q. Was there anything else said?

A. Later he was asked about some shells, and in reference to those shells, he made the statement that he was going to get a gun to fit the shells and blow the house up and blow his own brains out.

Mr. FLANNERY: Would Your Honor bear with me a moment?

I believe that is all I have of this witness, Your Honor.

CROSS EXAMINATION

By Mr. FORD:

Q. Sergeant, you have testified that on the morning of the 26th, when you arrived, Inspector Kelly of the Fire Department handed you two instruments, to wit, an ice pick and a wrench; is that right?

A. No, sir. That was Fire Marshal Roberts.

Q. Roberts handed it to you?

A. Handed those instruments to me.

Q. And you identified those as being the two instruments?

A. That is correct, sir.

Q. Now did you when they were turned over to you at any [425] time, either yourself or has anyone else in the Police Department examined either one of those instruments for any fingerprints?

A. I did not.

Q. Does the Police Department have available and did have available on that day a laboratory and a division for the taking of pictures of fingerprints on instruments that may be considered evidence of crime?

A. Oh, yes.

Q. Were these instruments, either one or both, on that day or any day since then turned over to them to see if there were any fingerprints on either one of those instruments?

A. They were not.

Q. Now, taking up each instrument by itself. I notice you said that when you got to the hospital and saw the defendant, he had some wounds in his neck (indicating), two?

A. That is correct.

Q. And wounds on his chest?

A. That I didn't see.

Q. You didn't see.

Taking up these wounds that you did see, I think you described them as puncture wounds; correct?

A. That is correct.

Q. Now that is exactly the type of wound that a device like this makes, isn't it, a puncture wound; right?

[426] A. That is correct.

Q. Now when this was turned over to you, this pick, did it have blood on it?

A. It did.

Q. And where was the blood on it?

A. The blood about took in the whole point of the blade.

Q. Would you say it had blood on it up to the hilt?

A. I would.

Q. And by hilt, you mean this part of the instrument, do you not, right there (indicating); correct?

A. Yes, sir.

Q. And that instrument had blood on it, did it not?

A. It did.

Q. From the very point all the way down the whole entire blade up to the point here (indicating) which you referred to as the hilt. There isn't any question about that at all, is there?

A. No, sir.

Q. Now we'll take the next instrument, this wrench. I understood you to say after this wrench was handed to you, you took it and it was in a set position to fit a nut that was in a pipe.

A. It was in the position that it was given to me. I didn't tamper with the setting at all. I was shown a one-inch plug. [427] I took it up to that plug, dropped it over it, and it fit exactly.

Q. This is the part of this lug that you change this distance, isn't it; you work it with your fingers, this roller, right?

A. It is.

Q. When this instrument was handed to you, you took it without changing this space at all or without in any way tampering with the mechanism, you went to a plug that was in a pipe; right?

A. Right.

Q. And you laid it down, so to speak, and the distance in here fitted that plug; right?

A. No, I didn't lay it down. I have a picture showing the plug, if you would like to see that.

Q. How did you take it? Did you put it up with your hand manually?

A. Put it up with my hand. It was within easy reach——

Q. Right.

A. —and it would—may I have that a minute?

Q. Right.

A. And it would be up there in just about that position (indicating).

Q. And that distance in here (indicating) fitted the plug in here (indicating); right?

[428-437] A. Right.

Q. Exactly so; right?

A. Exactly so.

Q. Did you know that prior to the time that Chief Roberts had handed you that instrument, that the fireman had used it to put that plug in that pipe?

A. No, I did not.

Q. You didn't know that, did you?

A. Because the plug was itself loose.

Q. You didn't know that, did you?

A. No, sir, I did not. I knew that the plug had been put back in.

Q. By whom?

A. By the Fire Department.

Mr. FLANNERY: Your Honor, I don't know that there is any evidence in this case that this wrench was used to put any plug back.

The COURT: I haven't heard any. Perhaps Mr. Ford expects to produce it.

* * * * *

[438] Q. I understood you went back on the 28th and took possession of the stationery; right——

A. Yes, sir.

Q. —the box?

A. Inspector Kelly and I were both back at the house on the morning of the 28th.

Q. The 28th?

A. Yes, sir, that is correct.

Q. And you went back on the 28th because you felt it was important to take possession of this stationery because of the letter; right?

[439] A. Because of the letter that we didn't know about on the 26th.

Q. I know you didn't. But on the 28th you knew about it?

A. That is correct.

Q. So when you knew about it, you went back to the premises two days later and took this; right?

A. I did.

Q. Now you say you had this letter and you wanted to ask Mr. Green about it on the 28th; right?

A. Sergeant Couture asked him about the letter.

Q. Now, for instance, he was asked questions in your presence about the contents of that letter; right?

A. He was.

Q. Now let us take up, if you will, what first appears in the letter: "Please notify W. T. Thompson, Fredericksburg, Virginia, of Miss Betty Brown's death," then there is a period. Now that is the first sentence; that is complete; right?

A. It is.

Q. And when you had the letter there and were questioning him about it, did you ask him who W. T. Thompson was, whom he asked to be notified?

A. I didn't. I believe he was asked as to whether or not this Mr. Thompson was a relative of the deceased, so that we could contact him in the normal way.

[440] Q. Correct, and he said it was, and that gave you that; right?

A. Yes, sir.

Q. Now let's take the next sentence, rather the last part of that sentence, in fact, "Miss Betty Brown's death." Did you ask Mr. Green what he meant by that, or did Couture or anybody in your presence, if he did; what did you ask him and what did he say?

A. I don't recall that I asked him and I don't recall that anyone else did at that time. They may have.

Q. Okay, but your recollection is that so far as your recollection is concerned, you have no recollection of his being asked about that part of the letter?

A. No, sir. I was trying to get him originally—

Q. Regardless of what you were trying, the issue is what your recollection is, whether you did or not, not your reasons for doing it or not doing it.

A. My only recollection, sir, was as to the time of the writing.

Q. I understand, but I am asking you specifically about this.

A. I didn't, no, sir.

Q. And nobody did in your presence, as far as your best recollection; right?

A. Right. They may have, but I don't recall.

[441] Q. Now let's take the next sentence that he wrote: "A fine and good lady, a true friend to me." Now did you ask him what did he mean when he wrote, "A fine and a good lady"?

A. No, sir, I did not.

Q. Did you not ask him or anybody else in your presence, Couture, say, in what way was she a fine or a good lady? Did you ask him how long he had known her, how long they had been together, what was their relationship, what made her a good and a fine lady, as he states? Did Couture ask her that?

A. I didn't at that time, Mr. Ford, but I do recall that back in my original talking to him at the Emergency Hospital, he told me that he at one time had lived with her when she had a rooming house on 10th Street——

Q. That would be some years ago.

A. That would be some years back.

—and that after she gave that rooming house up, that he took this one over; she came to live with him at that time. That is the only reference that I can give you as to that.

Q. And then did either of you ask him as to that sentence, "A fine and good lady," whether or not he used to do the marketing for her, whether he used to help her or whether he used to prepare any meals for her or help her in and out of bed or anything of that kind?

[442] A. Going back to the original conversation again, as I recall, he said that she was a semi-invalid and that she was able to move about the house but she didn't go out. I believe that he said he prepared the meals and so forth for her.

Q. Did you speak to him or did you ask him or did he tell you about the birthday party he gave her just a short while before May 26th?

A. I don't recall that, sir.

Q. And did he not say—and this includes Sergeant Couture, so when I ask you the question, I mean anybody in the group having the conversation—that he had gone out and gotten ice cream and cake and had another lady friend of hers there to celebrate her birthday?

A. I don't recall. He may have said that, but I don't recall.

Q. And wasn't there a discussion about how this elderly lady particularly liked jello and he would make the jello, go

out and buy it and then come back and cook it and make it?

A. That is something else I don't know. I say, he may or may not have made the statement, I don't recall.

The COURT: You gentlemen are having a private conversation. I notice the witness isn't readily heard by the jurors back at the other end of the box.

Mr. FORD: Excuse me. I will stand back here. I can't remember the exact wording of the letter, that is why I stood [443] near him.

By Mr. FORD:

Q. Now this is the next sentence on here: "We both want it this way." Did anyone ask him what he meant when he wrote "We both," what he meant by "We"?

A. I believe Sergeant Couture asked him whether or not he had consulted with her as to this letter, in other words—and he was asked this, I am pretty sure, if my recollection goes—as to whether or not there could have been a suicide pact.

Q. Was he asked who he meant by "We"? You see, that is in the plural.

A. We assumed—we could only assume.

Q. Was he asked?

A. I don't believe he was asked, but he was asked the direct question as to whether or not the deceased was let in on this letter, whether she was conferred with.

Q. But my question is not about the writing of the letter. You see, this sentence is, "We both want it this way." Now my question is, was he specifically asked who he meant by "We"?

A. I don't recall that he was.

Q. Now it says, "We both want it this way." Was he specifically asked what he meant when he wrote "want it this way," what that meant, "want it this way?"

[444-446] A. Of course, I had something in my mind. I don't know what was in the others' mind, and I didn't ask him.

The COURT: Wait. He is asking about what was asked.

By Mr. FORD:

Q. This conversation, not what was in one's mind.

A. No, sir.

Q. And then was he asked what he meant when he wrote, "Goodby, my friend"?

A. I don't think it was broke down that way, no, sir.

Q. And then was he asked what was meant by "Please have my ashes thrown on the Chesapeake Bay"?

A. I don't recall that he was asked that, either. He could have been by the others; he wasn't by me.

Q. And then you knew, of course, that when the letter was received by the lady, this letter, there was in it two twenty dollar bills; right?

A. Yes, sir.

Q. And then there is written in this letter, "The inclosed is for flowers for her." Now was he asked who did he mean should receive flowers; who did he mean by "her?"

A. I don't think he was specifically asked. We just took the same assumption that he was referring to the deceased throughout.

* * * * *

[447] Q. Oh, I just want to get into the record a clear picture of the room at Emergency Hospital, where you interviewed Mr. Green. I understand you to say you came into the emergency room and then right off that is an operating room?

A. They have two separate rooms there. The main operating room is directly ahead as you come into the emergency room proper; off to the right is a small cubical room.

Q. I think you referred to it as an operating room.

A. Yes, they are both operating rooms; one is much smaller than the other.

Q. So that the room you interviewed him in on the morning of May 26th was an operating room in Emergency Hospital; right?

A. That is right.

Q. And while you were talking to him, were the doctors [448] and nurses coming in and out?

A. I didn't see any doctors. I believe there was a nurse or two that came in there, but they had nothing to do with him. They were coming in for materials or whatever they use.

Q. But I understood you to say at that time that you did see a patch on his chest?

A. Yes, sir, I did.

Q. And was Sergeant Couture with you at that time?

A. He was.

Q. I wonder if you would describe what that was?

A. That, I would say, was a patch; it would probably be about four inches square, taped down on the corners of the chest. I made no examination of his chest and I didn't have the nurse remove it so that I could.

Q. But in looking at it, would you say it was a surgical dressing that is used——

A. Yes, definitely.

Q. —by the hospital——

A. By the hospital.

Q. —or any other doctor in his office?

A. That is right.

Q. No question about that?

A. None at all.

Q. And that was on his chest?

[449-459] A. It was.

* * * * *

[460] GOVERNMENT RESTS.

Mr. FLANNERY: For the record, at this time the Government will rest its case.

The COURT: Very well.

Mr. FORD: Now may we approach the bench at this period?

You have rested; is that correct?

Mr. FLANNERY: Yes, sir.

(At the bench:)

RENEWAL OF ALL MOTIONS PREVIOUSLY MADE AND DENIAL THEREOF

Mr. FORD: At this point, we want to renew all of our motions previously made.

The COURT: Well, Mr. Ford, I am quite willing to allow the record to indicate that you are now renewing all motions heretofore made and reflected in the record.

Mr. FORD: Fine. that will save it.

[461-472] The COURT: And that the motions as renewed are now denied. That will give you a complete record.

* * * * *

[473-484] EVERETT D. GREEN, the defendant herein, was called as a witness in his own behalf, and after being duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION.

By Mr. BLOW:

* * * * *

[485] Q. Were you able to sleep after you went to bed at 12:00 o'clock?

A. I dozed off and woke up, and then I thought about her weak condition; I thought I had better go down and see if she is all right.

Q. Did you do so?

A. Yes.

Q. What did you find?

Take your time, Mr. Green.

A. When I went down there, I found——

Q. I have to ask you these questions.

A. Okay, I can go through with it.

When I went down there, I found her dead in bed in the same position she was when I left her, exactly.

Q. How did you know she was dead?

A. I examined her.

Q. You are not a doctor?

A. No, but I have had quite a bit of experience.

Q. What do you mean by saying that you examined her?

A. I felt her pulse. I also put my ear to her heart. There was no heart beat. I put my ear to her nose. There was no breathing. I lifted up her arm. It dropped.

[486-487] Q. In what position was she on the bed?

A. She was lying flat on her back, as I said, in the same position as the way I left her, slightly diagonally across the bed, not completely straight with the bed, but slightly diagonal on the bed, flat, like this.

Q. What did you do then, Mr. Green? Put it this way: Did you call a doctor?

A. Well, her doctor was Dr. Yates. He was a man of about 75 years old, an excellent physician and I figured there was no need calling him out at that time of the night, being as he was so old, that in the morning I would call up either he or the coroner.

Q. Did you call anyone else that night?

A. No, sir, I didn't make any attempt.

Q. What did you do then?

A. Then I got hold of my stationery and I went out in the kitchen and wrote this letter.

Q. Is that the letter that has been introduced here by the Government?

A. Yes, sir, it is.

Q. And you wrote that letter?

A. I wrote that letter and put a stamp on it.

Q. When did you write that letter?

A. It was approximately 25 minutes to 1:00 when the letter was completed. It didn't take long to write it.

* * * * *

[488] Q. Mr. Green, what was your object in writing this letter?

A. It seemed like a foolish thing afterwards to do, but my object——

The COURT: No, answer his question.

The WITNESS: My object in writing the letter was to carry out what was in the letter. I intended to bump myself off at the time.

* * * * *

[489] The WITNESS: After I completed the letter, I sealed it and put a stamp on it. There were a number of stamps in with the stationery. I put a stamp on it and carried it out and mailed it in a mail box directly in front of the house, on the sidewalk in front of the house, and that was approximately a quarter to 1:00.

By Mr. BLOW:

Q. What did you do next?

A. I came back in the house, put the lights out and went back upstairs to bed again.

Q. How long did you stay in bed?

A. I stayed in bed until approximately five or ten minutes to 7:00 the next morning.

Q. Did you sleep from the time you went to bed until that time?

A. I had a little trouble in getting to sleep, but several hours afterwards I slept clear through until about ten minutes of 7:00 the next morning, when I got up.

Q. Would you tell the jury exactly what you did when [490-491] you woke up on the morning of May 26th?

A. I got up and put on my clothes, which consisted of a pair of pants, a pair of old loafers that I wore around the house, sox, and by it being warm weather, I went downstairs with just my undershirt on and my dress shirt in my hands and laid that on a chair in the kitchen after I arrived there.

Q. What did you do next?

A. When I walked into the kitchen, I noticed the door leading to the back basement was standing open and the light was lit.

Q. Did you make a telephone call at any time that morning?

Mr. FLANNERY: I object.

The WITNESS: Well, previous to that——

The COURT: Counsel must not suggest the answers.

Mr. BLOW: Yes, sir.

The COURT: Let him tell what he knows.

The WITNESS: I skipped a point there. When I came downstairs, I went direct to the telephone, turned on the light at the telephone, because it is rather dark in that corner down there, and I made an attempt to call Mrs. Anthony in Chevy Chase.

* * * * *

[492-501] Q. What time was it when you went to that phone?

A. It was maybe two or three minutes before 7:00 A. M.

Q. What did you do when you got to the telephone?

A. I dialed Mrs. Anthony's phone.

Q. And then what happened?

A. I didn't get any response. I listened for about eight minutes and didn't get any response.

Q. Then what did you do?

A. Well, I called Mrs. Anthony for the purpose—I didn't do anything.

Q. No, I asked you what you did.

A. Well, then I went back to the kitchen, but this is the

important point to bring up, the purpose of my trying to call Mrs. Anthony. I think that should be brought out.

Q. Very well, what was your purpose for calling Mrs. Anthony?

A. I called Mrs. Anthony to tell her that I had written a foolish letter and when she received it, not to pay any attention to it. That was my intention, and I thought perhaps she had gone down to the country; her people are way down in Virginia 150 miles. I thought she had gone down there to spend a few days.

Q. But there was no answer?

A. No answer.

* * * * *

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[502] EVERETT D. GREEN, the defendant, resumed the witness stand, and having previously been sworn, was examined and testified further as follows:

THE COURT: Mr. Blow, you may resume your examination.

DIRECT EXAMINATION (resumed)

By Mr. BLOW:

Q. Mr. Green, when the Court recessed yesterday, I believe you were telling the jury that you arrived at Emergency Hospital; is that correct?

A. That is correct.

Q. Would you tell the jury exactly what occurred after you arrived at the hospital?

A. They raised the stretcher I was on up to the height of the table and they slid me over on the table, side by side, like that (indicating).

Q. Would you speak loudly so the jury can hear you?

A. Well, as I said, they raised the stretcher up to the level of the table, which was about approximately—it would strike a person along about here (indicating) in a standing position—and slid me over onto the table, where they dressed the wounds I had.

[503] Did you receive any medical treatment for those wounds?

A. Yes, sir, I certainly did.

Q. When was that?

A. That was the morning of May 26, '53.

Q. Can you remember how long you were in the hospital before you received medication?

A. I arrived there approximately around 8:00 o'clock, 8:00 a. m.

Q. Did there come a time when you were visited there by a police officer?

A. Not a police officer, a homicide officer in plain-clothes.

Q. Do you remember approximately what time that was?

A. Maybe around 9:30 or 10:00 o'clock.

Q. How long did you stay at Emergency Hospital?

A. I stayed on that table, lying flat on my back, from the time that I arrived there until approximately 3:00 o'clock, when they transferred me over to Gallinger.

Q. What was your condition during the hours that you were at Emergency Hospital?

A. I was feeling pretty badly. I had been knocked out there for approximately an hour in the house, laying there in the smoke, and I remained laying in Emergency Hospital during that time without any water or anything. I asked [504-507] the nurse; my throat hurt me, but previous to that, my throat hurt me, they dressed my wounds, put antiseptic, also injected some kind of solution into my arms.

Q. When you left the hospital, how did you leave the hospital?

A. On a stretcher. They brought in a stretcher alongside the table and slid me off the same way they did when they put me on the table, just the reverse.

Q. Where, again, were you taken from Emergency Hospital?

A. To Gallinger.

Q. Where were you taken to?

A. Transferred to Gallinger.

Q. Will you tell the jury what occurred then?

A. Well, on arrival at the hospital, they naturally carried me out and carried me into a hallway, and I stayed there for a few minutes, then they transferred me from there to an elevator, and from there to the room, where there was between six and eight beds in there, no more and no less, six and not more than eight beds. My bed was

by the window. And they did the same thing there, slid me from the stretcher onto the bed.

Q. What was your condition at that time?

A. Just about the same as it was in the early part of the morning. It was unchanged.

* * * * *

[508-533] CROSS-EXAMINATION

By Mr. FLANNERY:

* * * * *

[534] Q. Then you were taken to Emergency Hospital; isn't that right?

A. One of the men that was administering the oxygen, he says, "He's okay, take him to the hospital." And at that— I was blinded at that time, too. I couldn't open my eyes. My eyes were closed completely for at least an hour, an hour and a half, after they had taken me away from the house.

Q. My question to you, Mr. Green, was this: Were you taken to Emergency Hospital?

A. How is that?

Q. You were taken to Emergency Hospital?

A. Yes, yes.

Q. Just listen to my questions.

Now, do you remember getting to Emergency Hospital?

A. Yes.

Q. What time did you get there?

A. After they washed my eyes out, I imagine I was lying on that table for approximately three-quarters of [535] an hour before they washed out my eyes, and then when I looked at the clock, it was around about 8:30 or thereabouts. I had no idea of time, no more than the time that it was testified to at the morgue and other things, connecting up the other things.

Q. You say you looked at the clock at Emergency Hospital and saw that it was 8:30?

A. Yes, somewhere like that. Another way——

Q. Wait a minute. No question is pending.

Now after you looked at the clock and you saw that it

was 8:30, how long was it after that that the plainclothes sergeant came to talk to you?

A. He might have come there within the next hour or maybe sooner.

Q. You remember him coming there, don't you?

A. I remember of him coming?

Q. Yes, sir.

A. Yes.

Q. Do you know his name?

A. I don't know which one came first. One of them came.

Q. One of them came first and then he left and then two of them came back to Emergency; isn't that right?

A. That might be so.

Q. Sir?

A. I say, that might be so.

[536] Q. What do you mean, it might be so?

A. Well, the way I felt and all and worried about Miss Brown and the house, I just couldn't think clearly.

Q. I am asking you what you remember now. Do you remember after the first sergeant came, that sometime later he came back with another sergeant?

A. Some time two men came there. I was lying there on this table with my eyes closed and not sleeping or anything like that, but kind of felt drugged, stupid.

Q. Did they give you drugs?

Mr. FORD: Who is "they"?

The WITNESS: No, I meant to say I was stunned from that blow.

Mr. FORD: Just a minute. Who do you mean, "they"? Do you mean the doctors?

Mr. FLANNERY: The doctors.

The WITNESS: I have reference to these two homicide officers that came the second time, when they appeared there at Emergency the second time, that he has reference to.

By Mr. FLANNERY:

Q. Now let's get back to the first officer. The first officer came and talked to you and asked you what had happened there at your house, didn't he?

A. At the time when he came in, my eyes hadn't been washed out, I couldn't open them, the first time.

[537] Q. Didn't you testify a little while ago they washed your eyes out and you looked up and you could see the clock?

A. I thought I did.

Q. What time did you say it was when you looked up at that clock?

A. I just said around 8:30; I might be wrong.

Q. Didn't I ask you then how long was it after you looked at the clock that the policemen came and talked to you?

A. How long after I looked at the clock?

Q. Yes. Didn't I just ask you that, and didn't you say that it was within the hour after you looked at the clock?

A. Well, I would say now, I would say now, and giving it more thought, that it was much after 9:00 o'clock before my—I mean after 8:00 o'clock—it was nearer to 9:00 or maybe later than that when they washed my eyes out, but my eyes burned and they were closed a greater part of the time.

[538] Q. You remember Sergeant Couture coming to talk to you?

A. I would say one detective. As to which one came first, I don't know.

[539] Q. Did he ask you what had happened there at your house?

A. Yes.

Q. Did you tell him what happened?

A. I told him as near as I could or tried to.

Q. What did you tell him?

A. I don't recall what I told him. I told him about this man hitting me and about going downstairs and seeing this little fire in the front of the house.

Q. You remember telling him that, don't you?

A. Yes, I did.

Q. Now he talked to you there for a short time, then. Isn't it a fact that he came back with another police officer?

A. Later on, maybe within an hour and a half or so, something like that.

Q. Then the two of them asked you what had happened there, didn't they?

A. I think I repeated it as near as I could the same as the first time.

Q. You repeated the same thing you told Sergeant Couture the first time?

A. That is my recollection.

Q. Is that right?

A. I think I did.

Q. They didn't threaten you or make any promises to you, did they?

[540] A. No.

Mr. Ford: I object. He has never said that or testified to it.

The Court: Objection overruled. Answer the question.

The Witness: You say they never threatened me?

By Mr. Flannery:

Q. I am asking you, did they?

A. No.

Q. They asked you what had happened, didn't they?

A. Yes.

Mr. Ford: I submit that that has been answered before. He has already asked him, didn't they ask you what happened, and he told them.

The Court: The answer may stand.

By Mr. Flannery:

Q. Did they the second time ask you any questions which you had not been asked on the visit of the first police officer?

A. I don't remember of any.

Q. Did they ask you about the plug being taken off of that gas line?

A. I don't even remember of them asking me that.

Q. Did they ask you about an ice pick at that time?

A. I think they did.

Q. You remember that?

[541] A. I think so.

Q. What did they ask you about the ice pick?

A. The exact words I couldn't tell you.

Q. Give us your best recollection.

A. I tell you frankly, I don't remember exactly how they asked it.

Q. You don't have to give it to us exactly, Mr. Green. Just give us your best memory of it.

A. They asked me something about it. They asked me what happened. I told them about the man hitting me and stabbing me. I don't know what else they could ask about or what they did ask me about.

Q. Did they ask you about writing a letter?

A. I couldn't say whether they did at that time or not.

Q. Now then, you were taken over to Gallinger or D. C. General Hospital, weren't you?

A. Approximately around 3:00 o'clock, the best I can recollect.

Q. And then do you remember when you were there that same afternoon, May 26th, that two firemen came over and talked to you?

A. Two firemen came, a chief with a lot of brass on him, and he, contrary to the evidence here, he didn't open his mouth. Inspector Kelly did all the talking.

Q. Did Inspector Kelly come over?

[542] A. He came with him.

Q. He asked you what had happened, didn't he?

A. Naturally, I take for granted he did.

Q. What did he ask you?

A. He asked me about what happened at the house. I told him as best I could.

Q. What did you tell him?

A. That—my memory is not clear at all. I do remember that chief, whatever you want to call him, with the brass on—he didn't have anything to say.

Q. What did Inspector Kelly have to say?

A. He asked about the fire, but his exact words I don't remember at all.

Q. What did you say to him about the fire?

A. That could have been the time when he said to me, Now, Mr. Green, you are getting up in years; you want to clear yourself with the man upstairs, or something to that effect.

Q. Do you remember that?

A. Yes, I do.

Q. Very clearly?

A. Yes, sir.

Q. What else do you remember?

A. I remember of the police coming there; I think it

might have been the captain of the Homicide Squad. He didn't have anything to say to me.

[543] What I mean, Mr. Green, is what else do you remember of the conversation you had with the two firemen?

A. They asked me such questions as has been stated here along that general line as to what happened and so forth and wanted to know if I set any fires and such stuff as that. I told them no.

Q. Didn't they ask you whether or not you had written a letter?

A. They could have.

Q. I am asking you, do you remember?

A. No.

Q. You don't remember that?

A. No.

Q. Now, how long did they talk to you that afternoon?

A. I think there was a clock in the room; I am not sure —no, the clock was in the hall. They might have stayed 15 minutes.

Q. Then there came a time, I believe, the next day, May 27th—no, I think it was May 28th, the morning of May 28th —didn't Sergeant Clarke, Sergeant Couture and Inspector Kelly come over there to the D. C. General Hospital and have in their possession at that time this letter, which you say now that you did write?

A. I think I remember that.

Q. They had that letter, didn't they?

[544-563] A. Yes.

Q. And at that time they asked you if you had written the letter?

A. Yes.

Q. At that time you told them that you had written a letter?

A. Yes, that is right.

Q. Now isn't it a fact that when you had been asked that question before they had the letter, you had been asked that question a day or so before, that you had denied writing a letter?

A. Well, at that time I felt a considerably bit better than I did the day before.

Q. No, the question is, hadn't you before they actually

had the letter in their hand—hadn't you a day or so before denied writing a letter?

A. Yes, I did, because I never at that time had any recollection of writing any letter.

* * * * * *

[564-571] The Court: Do you have any prepared instructions or are you leaving that to me?

Renewal of All Motions Previously Made and Denial Thereof

Mr. Ford: A couple we have, Your Honor.

First, I would like to renew all the motions we have heretofore made, now that the case is entirely in. And then we have some written instructions we would like to submit to Your Honor.

The Court: Let the record show that the renewed motions are denied.

* * * * * *

[572] Argument on Behalf of the Government

* * * * * *

The defendant in this case is charged with first degree murder. He is charged with having committed arson and, [573-577] in the course of the arson, having caused the death of Betty Brown. Now I say first degree murder, ladies and gentlemen. I think most laymen have the impression that in first degree murder you have got to have premeditation, deliberation, intent to kill. Ladies and gentlemen, that is true ordinarily if the so-called common law statute is used in the indictment. The common law statute isn't used in this crime, ladies and gentlemen. This is a so-called felony murder. In this this case the Government does not have to prove deliberation, premeditation, intent to kill. His Honor will explain that to you.

* * * * * *

[578] Now the defendant having been taken from the premises, ladies and gentlemen, was taken to Emergency Hospital. Sergeant Couture talked to him, and you re-

member Sergeant Couture's testimony. He went up there. At that point Sergeant Couture, according to his own testimony, didn't know what had caused the fire nor have any information. All he knew was there had been a fire at the place and this man had been taken out of the fire, and he wanted to find out the facts about it. He went up and talked to Green, and Green told him the story about the unidentified colored man. Later that day Sergeant Clarke and Sergeant Couture go back and they talk to this man again, and Sergeant Clarke at that time had seen the box of [579-588] letter paper which is in evidence here, and Sergeant Clarke asked this man, Well, now, did you write any letters, Mr. Green? What did Mr. Green say? Mr. Green said no. Then later Mr. Green is questioned, I believe, that afternoon, the afternoon of May 26th, by Inspector Kelly. Again he is questioned. Again he makes no reference to a letter. He makes no reference to the letter, ladies and gentlemen, until the letter is received by Mrs. Anthony, the witness in the case, until he is confronted with the physical evidence in the case, the letter, and then he says, Oh, yes, I wrote the letter.

Now the defendant tells you in this case, ladies and gentlemen, that he found the deceased dead. He would have you believe, ladies and gentlemen, that her death was not caused by this fire, that she was dead before the fire started. But the evidence is overwhelmingly against that, ladies and gentlemen. There is not a shred of evidence in this case to the effect that this woman was dead other than his own statement, and if there was any question about it after having heard the testimony of Dr. Rosenberg and heard the testimony of other witnesses in this case, that question should have bene resolved, ladies and gentlemen, when you heard the defendant himself testify, because he told you a completely unreasonable story, a story, ladies and gentlemen, which I say is false on the very face of it. His story just doesn't make sense.

* * * * *

[589] He tells you further that yes, he remembers talking to Sergeant Couture and Sergeant Clarke at Emergency Hospital, yes, he remembers talking, he remembers about that unidentified colored man. But he doesn't remember

discussing the letter, no, he doesn't remember discussing that letter. So far as he can remember, the first time he discussed the letter is when the letter was brought to him.

Ladies and gentlemen, he is asked, Well, now, Mr. Green, you say you found the deceased in this case dead. Why didn't you, when Sergeant Couture first came up there and talked to you—why didn't you say, oh, Sergeant, this is what happened; last night I discovered Betty Brown dead, and then if he wanted to follow through with the rest of that story, then I went downstairs and this unidentified colored man stabbed him. But no, he didn't tell Sergeant Couture that. He didn't tell Sergeant Clarke that. He didn't tell Inspector Kelly that. He didn't tell them that over at the morgue. Why didn't he? Because it is a story he thought up afterwards.

Ladies and gentlemen, it makes sense in this case to [590-591] take this view of it. If that poor old lady had been dead, as he says she was, he would have told the officials investigating this matter about it just as soon as possible. Don't you know he would? Doesn't it make common sense that he would? Isn't the fact that he didn't an indication to you that he is not telling you the truth now?

* * * * *

[592-595] ARGUMENT ON BEHALF OF THE DEFENDANT

* * * * *

[596-597] The COURT: Mr. Ford, you may address the jury.

* * * * *

[598] And the law says, not me, ladies and gentlemen, the law says that you are here as individual jurors. It is not a regimentation of you, no. Each one, by yourself, is asked to render a verdict based upon your conscience and the evidence as you hear it. And let me say something further. On all questions of fact—remember, I said all, and I meant it; there is no exception, none whatever; no mind can conceive of an exception—on all questions of fact, you and you, and you and you, and all of you, are the sole judges of it in this case. Whatever you individually decide to be the facts [599-624] in this case, no living soul, no, to the highest court

in the land, the Supreme Court of the United States, can say that about it; no living soul, organization, I care not where it may be, can hold you to their opinion on questions of fact, for you are the sole judges of the facts, and when you have made up your mind fairly and justly as a human being, then I beg you to stick with it until you die, and you are responsible to no one. That is our system of justice, the American system of justice, and please remember it. No one on the face of the earth can challenge your individual decision on what you consider the facts to be. Please, I ask you, as he does, under your solemn oath and sacred oath, please, to follow out that principle of our law.

* * * * *

[625] The Court: Mr. Flannery, you may address the jury.

ARGUMENT IN REBUTTAL.

* * * * *

[626] Now Mr. Ford talks about the functions of all of us here. He told you what his function was, and Mr. Blow's, and certainly he has carried his functions out in the highest tradition. Now my function is to present the evidence to you in behalf of the people of this community. The grand jury has stated that a crime has been committed, that a woman has been killed; it is murder. It is my duty to bring those facts to you. That is Mr. Ford's duty. It is my duty. What is your duty and function in this case? I will tell you at the outset what it is not. It doesn't consist in sending this defendant to the electric chair. You have nothing to do with sending this defendant to the electric chair. Your duty as representatives and members of this community is to sit here, listen to the facts, take the law that His Honor will give you which governs this case, and then in accordance with the facts and with the law, to reach a fair and impartial verdict based on the evidence and the law, and on nothing else.

At that point, ladies and gentlemen, you will decide what you are going to do in the case, come back with your verdict, and that ends your responsibility, just as Mr. Ford's responsibility is ended, and Mr. Blow's, when they have sat down. When you go out, their responsibility will end, and they will

have discharged their duty in the highest tradition. My job will be over when I sit down here. Your job will be over [627] when you come back with your verdict.

Now if you should find this defendant guilty, the responsibility as to the consequences of your verdict falls to someone else. It is not you. You don't have to come down here at sometime later or even today or tomorrow, whenever you bring your verdict back, and say, well, now, you go to the electric chair. That is not your function. That is His Honor's function. And it doesn't end there. There is the United States Court of Appeals. They have a responsibility to sift the facts and look them over and decide whether this man will go to the electric chair. There is the Supreme Court of the United States. If they see fit, they can look these facts over and decide if this man goes to the electric chair. There is the President of the United States, who may look these facts over, and as you well know, often these sentences are commuted to something less than death in the electric chair. There is The Attorney General of the United States, who may make recommendations to the President of the United States relative to this sentence.

Now I mention that, ladies and gentlemen, because I want to emphasize to you that it is the responsibility of those people, the Judge, the Court of Appeals, the Supreme Court, if they should decide to hear the case; the President of the United States, if it should come to his attention. It is the responsibility of those people to decide whether this man [628-632] goes to the electric chair. It is not yours, ladies and gentlemen. I want to emphasize that because I consider it important that your function be defined by me to you. So bear that in mind, ladies and gentlemen, and bear in mind your function in this case is fact-finders. You are the fact-finders. You have to decide: (1) Did Green set the fire? (2) Did Miss Betty Brown die as a result of the fire? And that ends your function in the case, and the responsibility of other people comes into it when we consider the answer or consequences as to what is going to happen to this man.

* * * * *

[633] Now with this, ladies and gentlemen, I will leave the case with you.

I want to emphasize again your function, your responsibility in the case. Your responsibility is to make a finding

on the facts and the law as to whether or not this man set the fire and whether or not this woman died as a result of it. Your function is not to send this man to the electric chair. I want to emphasize that, ladies and gentlemen, and that should not properly be a matter for your consideration.

The consequences or the result of your verdict is something that you are not concerned with or should be concerned with.

As I say, there is the Judge in this case, the Court of Appeals, the Supreme Court, the President, The Attorney General, and I am sure this man's rights will be protected all the way along the line. It is the responsibility of these other people to decide what to do with this man and not you, and I am sure his rights will be protected all along the line.

The COURT: The jury will keep in mind the admonition and take a five-minute recess.

[634] THE COURT'S CHARGE TO THE JURY

The COURT: Ladies and gentlemen of the jury, it is provided by statute that whoever being of sound memory and discretion, without purpose so to do, kills another in perpetrating or in attempting to perpetrate any arson, rape, mayhem, robbery or kidnapping is guilty of murder in the first degree. You are told that the punishment for murder in the first degree shall be death by electrocution.

The indictment is drawn in two counts. You are told that you will not be concerned with the first count of the indictment but will limit your consideration entirely to the allegations and charges found in the second count of the indictment. The second count specifies that on or about May 26, 1953, within the District of Columbia, the defendant, Everett D. Green, committed the offense of arson; that is to [635] say, he maliciously did burn, and cause to be burned, a certain building known as 1115 Massachusetts Avenue, Northwest, the property of Gerald Freed, and in perpetrating the offense of arson aforesaid, caused Betty Brown to inhale certain gases, the inhalation of which resulted in her death, within the District of Columbia, on or about May 26, 1953.

The definition of arson is found in the statute, which provides that whoever shall maliciously burn or attempt to burn any building or house, barn or stable adjoining thereto, or

any store, barn or outhouse or any shop, office, stable, store, warehouse or any other building, the property in whole or in part of another person, shall be guilty of the crime of arson and shall be punished by imprisonment in the penitentiary.

To this indictment the defendant has entered a plea of not guilty.

[636] The essential elements of the crime charged in the indictment are:

(1) that the defendant, on or about May 26, 1953, intentionally and maliciously did burn or attempt to burn the building known as 1115 Massachusetts Avenue, Northwest, in the City of Washington, in the District of Columbia;

(2) that such building was the property of another per-

[637-646] son, to wit, one Gerald Freed;

(3) that in burning or attempting to burn such building, the defendant acted with malice;

(4) that the death of the deceased, Betty Brown, was caused by and was the direct result of the defendant's act in burning or attempting to burn such building.

If the Government has proved to your satisfaction beyond a reasonable doubt each of the elements as stated, then your verdict will be guilty as charged. If you find that the Government has failed to prove any one of such elements to your satisfaction beyond a reasonable doubt, then your verdict must be not guilty.

As I have told you, the defendant's intention to burn or to attempt to burn the building is an essential element of the crime charged in the indictment. You are now told that intent to kill is not a material element of the crime charged.

* * * * * *

[647] VERDICT

(At 10:30 p. m., the following proceedings occurred:)

The CLERK: Mr. Foreman, has the jury agreed upon a verdict?

The FOREMAN: We have, Your Honor.

The CLERK: What say you as to the defendant Everett D. Green on Count 2?

The FOREMAN: Guilty as charged.

[648] The COURT: The defendant will be committed for sentence.

Mr. Ford, is there any reason or occasion for a reference [649] of this case to the probation office?

Mr. FORD: I would say——

The COURT: I know of none.

Mr. FORD: I don't know of any, either, because it is mandatory.

The COURT: The defendant will be committed for sentence.

(Thereupon, at 10:35 o'clock p. m., the trial in the above-entitled cause was concluded.)

[650-694] (Reporter's Certificate to foregoing transcript omitted in printing.)

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[695] [File endorsement omitted]

In United States District Court for the District of Columbia

[File endorsement omitted]

UNITED STATES

vs.

EVERETT D. GREEN, *Defendant*

Criminal No. 1083-53

Charge Arson; First Degree Murder

VERDICT—May 19, 1955

On this 19th day of May, 1955, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon after hearing further of the evidence and the instructions of the Court, the two alternate jurors are discharged from further consideration in this case. The jury retires to consider their verdict.

The jury returns into Court and upon their oath say that

the defendant is guilty as indicted on count two; and thereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof says that the defendant is guilty as indicted on count two.

The defendant is remanded to the District of Columbia Jail.

By direction of

F. Dickinson Letts,
Presiding Judge,
Criminal Court #2.

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[696] [File endorsement omitted]

In United States District Court for the District of Columbia

[File endorsement omitted]

[Title omitted]

Motion for Judgment of Acquittal—Filed May 20, 1955

The defendant moves the court for a judgment of acquittal for the following reasons:

1. The court erred in not declaring a mistrial when the United States Attorney made statements to the jury which substantially prejudiced the defendant.
2. The court erred in denying the defendant's motion to dismiss the indictment on the ground that he had once been in jeopardy for the offense of first degree murder.
3. The evidence presented by the Government is insufficient to sustain a conviction.
4. And for such other reasons as will appear when this motion is heard.

Respectfully submitted,

George Blow.

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[697] Certificate of Service (omitted in printing)

[698] [File endorsement omitted]

In United States District Court for the District of Columbia

[File endorsement omitted]

[Title omitted]

MOTION FOR NEW TRIAL—Filed May 20, 1955

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in excluding testimony and records.
2. The court erred in admitting conversations between police officers and defendant on May 26, 1953.
3. The court erred in refusing to permit cross-examination of prosecution's witnesses on topic testified to by witness on direct examination.
4. The court erred in charging the jury.
5. The defendant was substantially prejudiced and deprived of a fair trial by reason of statements made by the United States Attorney to the jury.
6. The court erred in admitting testimony to which objections were made.
7. The court erred in denying defendant's motion for judgment of acquittal made at the close of the Government's evidence.
8. The verdict is contrary to the weight of the evidence.

[699] 9. The verdict is not supported by substantial evidence.

10. The court erred in not instructing the members of the jury sufficiently during the course of the trial regarding their obligation to disregard newspaper coverage of the trial.
11. And for such other reasons that will appear when this motion is heard.

GEORGE BLOW.

CERTIFICATE OF SERVICE (omitted in printing)

[700] [File endorsement omitted]

In United States District Court for the District of Columbia

[Title omitted]

[File endorsement omitted]

Criminal No. 1083-53

Charge Arson; First Degree Murder

ORDER DENYING MOTION FOR NEW TRIAL, ETC.—June 10, 1955

On this 10th day of June, 1955, came the attorney of the United States, the defendant in proper person and by his attorneys George Blow, Esquire and Charles E. Ford, Esquire; whereupon the defendant's motions for new trial and for judgment of acquittal each coming on to be heard, after argument by counsel, are by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

F. DICKINSON LETTS,
Presiding Judge,
Criminal Court #2.

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[701] [File endorsement omitted]

In the United States District Court for the District of Columbia

CRIMINAL NO. 1083-53

UNITED STATES

vs

EVERETT D. GREEN

JUDGMENT AND COMMITMENT—June 17, 1955

On this 17th day of June 1955 came the attorney of the Government, and the defendant appeared in person and by counsel, George Blow and Charles E. Ford, Esquire.

It is adjudged that the defendant has been convicted upon

his plea of not guilty and a verdict of guilty of the offense of

Murder in the First Degree
(Vio. Sec. 2401, T. 22, D. C. C.)

as charged in count two;

And the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

The sentence of the Court was as follows; and it is so adjudged:

Everett D. Green, you have been found guilty upon an indictment including the charge for the offense of Murder in the First Degree, and, upon the verdict of guilty, you are hereby sentenced to the punishment of death by electrocution; and it is

Ordered that you, Everett D. Green, be forthwith taken to the District of Columbia Jail, otherwise known as the Washington Asylum and Jail, in the District of Columbia, and there be kept in close confinement; and that on the 4th day of November, A.D., 1955, you be taken to the place prepared for your execution in the District of Columbia [701a] Jail, and that then and there you be electrocuted according to law; and it is

Further ordered that a certified copy of this judgment and commitment be transmitted by the Clerk of the United States District Court for the District of Columbia to the Superintendent of the aforesaid District of Columbia Jail not less than ten days prior to the time fixed in this judgment of the Court for the execution of the same.

F. Dickinson Letts,
Judge.

[702] [File endorsement omitted]

In the United States District Court for the District of Columbia

(Title omitted)

NOTICE OF APPEAL—Filed June 17, 1955

Name and address of appellant:

Everett D. Green
200 19th Street, S. E.
Washington, D. C.

Name and address of appellant's attorneys by court appointment:

George Blow
701 Union Trust Building
Washington, D. C.
Charles E. Ford
416 Fifth Street, N. W.
Washington, D. C.

Offense: First degree murder

Concise statement of judgment or order, giving date, and any sentence: Defendant was adjudged guilty of murder in the first degree on June 17, 1955, and a sentence of death was imposed. Name of institution where now confined, if not on bail:

District of Columbia Jail
200 19th Street, S. E.
Washington, D. C.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Dated June 17, 1955.

EVERETT D. GREEN,
Appellant.
GEORGE BLOW

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[703] Clerks Certificate to foregoing transcript omitted in printing.

[704] [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia Circuit

No. 12,809

EVERETT D. GREEN, Appellant

v.

THE UNITED STATES, Appellee

Appeal from Judgment of the United States District Court for the District of Columbia

PETITION FOR REHEARING—Filed February 24, 1956

On behalf of appellant, it is prayed that this case be reheard, with oral argument, by the Court *en banc*. The case was decided on February 9, 1956. This is an appeal from a judgment of electrocution for killing another while perpetrating an arson, imposed after appellant's second trial upon the same indictment.

Grounds For Rehearing

Court-appointed counsel for appellant present the following grounds in support of this Petition for Rehearing:

I. The present opinion, if followed, will allow multiple prosecutions for varying degrees of the same offense in the District of Columbia. In rejecting appellant's contention that an unappealed conviction of arson barred a second prosecution for killing another while perpetrating that arson, the present opinion misinterprets the test of identity of offenses upon which it relies. Under the test adopted in the opinion at pages 7-8, appellant has been twice in jeopardy. His conviction and the mandatory sentence of death imposed should therefore be set aside.

[705] II. A five-four opinion of the Supreme Court, rendered over fifty years ago, has *for the first time* been applied to the federal (as distinguished from the insular) courts by a Circuit Court of Appeals so as to abrogate, the rule at common law that one erroneously convicted of an offense lesser in degree than that charged will not, by seek-

ing review of his conviction, be presumed to have waived the protection otherwise afforded him by his acquittal of the higher. Retrial, at common law, is limited to that offense of which the accused was previously convicted. The common law rule was incorporated in the Bill of Rights.

III. The first point made in the present opinion implies that appellant had requested a new trial. In fact, he had not. Since current opinions of the Supreme Court indicate that one may, under certain circumstances, waive his defense of former jeopardy by requesting a new trial, review by the Supreme Court of this case may be difficult to obtain if this portion of the opinion is not amended so as to make it clear that appellant's counsel at oral argument on his first appeal informed the Court that retrial would, in his opinion, raise questions of former jeopardy.

IV. A Supreme Court rule intended to preclude the *opportunity* for police interrogation of a suspect before he has been brought before a committing magistrate and advised of his right to counsel and his right not to make statements which might later be used against him is substantially weakened by the present opinion, which holds that certain statements of the accused, heavily relied upon by the prosecution, were admissible, *not in spite of, but because of* the fact that appellant apparently required medical treatment. (opinion, p. 8).

[706] After his arrest, Caneen was held by police in the "strong room" at Gallinger Hospital for two and a half days, where, "without the aid of friends or the benefit of counsel," he was interrogated by police and fire department officers.

The present opinion raises the question whether overzealous police may not find it convenient to hospitalize a suspect in order to obtain sufficient evidence to convince a magistrate that he should be committed.

V. The present opinion, by describing certain remarks made by the prosecuting attorney to the jury as "insufficient" reason for reversal, even when considered in light of other errors advanced by counsel, condones reference in the trial court to the responsibility of this Court to "sift the facts", that of the Supreme Court and the President to "look these facts over," and to that of the attorney general to make recommendations "to the President of the

United States relative to this sentence." The jury should not be told that responsibility for determining the facts can be shifted to the reviewing authorities.

Statement of Facts

Appellant was tried upon an indictment charging, in two counts, arson and killing another while perpetrating that arson. "Found guilty of arson under the first count and of murder in the second degree under the second," Green appealed "only from the latter." (*Green* v. *United States*, No. 12,188, decided January 20, 1955). This Court found that there was no evidence to sustain the conviction. All the evidence indicated that Green was either guilty of [707] killing another while perpetrating an arson, which carries a mandatory death penalty, or he was not guilty. On remand, the Government moved to try Green again for killing while perpetrating the arson. His plea of former jeopardy was rejected by the trial court. Found guilty, he was sentenced to death. This appeal followed.

Points on Appeal

Upon his appeal to this Court Appellant relied on these points:

(1) Former jeopardy.

(2) Admission of statements elicited by interrogation over a two-and-one-half-day-period before being taken before a committing magistrate, was error.

(3) The prosecution's summation induced the jury to disregard its responsibility.

(4) Exclusion of material testimony offered by the defense left damaging inferences from prosecution testimony immune from contradiction.

(5) Granting of prosecution's requested instruction that the "vitality" of the deceased was an "immaterial consideration" tended to remove from the jury's consideration the question whether Miss Bettie Brown died as a result of her general debility rather than as a result of inhaling smoke.

(6) The trial court's admonition to the jury inadequately warned them to ignore misleading newspaper interpretations of the issue in the trial, and the failure to repeat the admonition whenever the jury separated was prejudicial.

Discussion of Opinion

The following discussion of the present opinion is broken down into sections corresponding to the grounds for rehearing herein urged:

(1) In order to defeat appellant's contention that his unappealed conviction of arson barred a subsequent prosecution for killing another while perpetrating arson, the di- [708] vision of this Court which heard this appeal has in effect ruled that a conviction of a lesser included offense will not bar the Government from afterwards seeking a conviction on the greater offense *even when there has been no appeal.* Hereafter, one indicted and tried for deliberate and premeditated murder who is convicted of second degree murder, and does not appeal, may again be prosecuted for first degree murder.

The test of identity of offenses adopted by this Court is that in *Morey* v. *Commonwealth* 108 Mass. 433, (1871). As stated by the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth, supra,* quoted on page 7 of this opinion, "*if each statute* requires proof of an additional fact which the other does not,* an acquital or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis supplied.)

Under this rule, Green was clearly exempt from a second prosecution for killing another in perpetration of an arson because every element of the crime of arson had to be proved before he could be guilty of the killing. Thus, rather than "each statute," only one required proof of an additional fact.

The present opinion, however, rejected Green's plea of double jeopardy because "evidence sufficient to convict Green of arson under the first count would not have con-

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* The cases cited in support of this test are all examples of separate statutory offenses, each of which required proof of a separate act and a separate intent not required in the other—Carter v. McCluaghry, 183 U. S. 365 (1902) (conspiracy to defraud and causing false and fraudulent claims to be made); Gavieres v. United States, 220 U. S. 338 (1911) (indecent behaviour in public and insulting and threatening a public official); Morgan v. Devine, 237 U.S. 632 (1915) (breaking and entering and larceny).

[709] victed him of murder under the second, which required proof that the death of a human being was caused by the arson."

> "Hence the conviction of arson did not preclude later prosecution and conviction of murder committed in the perpetration of the arson."

Under this interpretation of the test adopted, no prosecution for a greater offense is precluded by an unappealed conviction or acquittal of the lesser included offense. The latter offense, by definition, must always lack the element which would make it the greater offense.

Normally, in order to commit murder, one need not commit arson. This was not true in the instant case where the indictment charged that the defendant, in perpetrating arson caused the deceased to inhale certain gases, the inhalation of which resulted in her death. Unless Green were guilty of arson, he could not be guilty of the killing charged. The multiple nature of the prosecutions here is demonstrated by the fact that in Green's second trial it was necessary for the Government to show again that he was guilty of arson —the same offense of which he had been found guilty a year before and had not appealed—and that deceased died from inhaling gases produced by that same fire.

The decision in *State* v. *Cooper*, 1 Green 361, 25 Am. Dec. 490 (N.J. 1833), which is directly in point, and which has been twice cited with approval by the Supreme Court,* is completely consistent with the test adopted by he present opinion, and should be determinative of the question presented.

[710] (2) The present opinion (pages 1-6), rejecting appellant's contention that his trial upon an indictment charging an offense for which he was once tried, but not convicted, placed him twice in jeopardy within the meaning of the Fifth Amendment, relies upon the opinion of Mr. Justice Peckham in *Trono* v. *United States*, 199 U. S. 521, 26 S.Ct. 121 (1905).

Three Justices of the Supreme Court agreed with Justice Peckham in the *Trono* case that "the better doctrine is that which does not limit the Court or jury, upon a new

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* See Appellant's Reply Brief, p. 2.

trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial. . . ." Four Justices disagreed. Mr. Justice McKenna emphasized that an accused should not be compelled to surrender his acquital of a higher offense as the price of seeking reversal of an erroneous conviction of the lesser. *Trono* v. *United States, supra,* at 538-539. As the division of the Court which heard this appeal noted on page 4 of its opinion of February 9, 1956, the deciding vote was cast by Justice Holmes.

The present opinion concluded that the Peckham holding must have been the holding of a majority of the Supreme Court because Mr. Justice Holmes had earlier, in *Kepner* v. *United States,* 195 U. S. 100, 134, 24 S. Ct. 797 (1903), indicated that he was unsympathetic to the concept of former jeopardy, no matter how defined. He dissented in *Kepner* from the decision of the majority of the Supreme Court denying the Government a right to appeal in a Philippine criminal case. If the views of Mr. Justice [711] Holmes in the *Kepner* case indicate, as the present opinion suggests, that he concurred in Mr. Justice Peckham's choice of the "better doctrine" for the federal courts, the remarks of Mr. Justice Brown in the same case indicate that he felt otherwise. Mr. Justice Brown, who concurred in the Peckham opinion, in the *Trono* case, made it clear in the *Kepner* case that he did not trust a Philippine magistrate with the "great and dangerous power of finally acquitting the most notorious criminals." *Kepner* v. *United States, supra,* at 137. This power, of course, is entrusted to Federal trial courts in the continental United States.

This is the first time that a Circuit Court of Appeals has examined the 1905 split in the Supreme Court and followed it in a closely related case. The present opinion adopts the opinion of the four Justices in the majority as "one with which we agree." The common law rule, made applicable to the federal courts by the Fifth Amendment, was otherwise.* At least 16 states in this country follow

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* "If the prisoner is convicted on one count of an indictment and acquitted on another, and then obtains a new trial, he is only tried

the common law rule. (See appellant's brief, pp. 15-16). [712] If an accused has been convicted of an offense lesser in degree than that for which he was indicted, and there is serious error in his trial, he should not be required to elect between suffering his erroneous punishment silently or risking retrial on the higher offense of which he was previously acquitted.

(3) A paragraph in the decision of this Court of January 20, 1955, reappears on page 2 of the decision of February 9, 1956. We believe that this paragraph conveys a misleading impression that Green sought a new trial following his conviction of arson and second degree murder at the first trial. In fact, no motion for a new trial was made in the trial court following his first conviction. On appeal, he urged simply that his conviction of murder in the second degree should be reversed. While it is true that Green did clearly understand the possible consequence of a successful appeal, his counsel also suggested to the Court at the time of oral argument there would be a problem of former jeopardy if the Government attempted to try Green again for killing another while perpetrating arson.

Since the Supreme Court has indicated that the defense of former jeopardy may be waived in certain cases if the defendant moves for a new trial, *Sapir* v. *United States*, 348 U. S. 373, 75 S. Ct. 422 (1955), *Bryan* v. *United States*, 338 U. S. 552, 70 S. Ct. 317 (1950), we respectfully submit that in the interest of fairness to appellant there should be no suggestion of waiver in the record which may be transmitted to the Supreme Court. It is therefore respectfully [713] requested that the opinion be modified so as to state that there was, in fact, no request for a new trial following Green's first conviction, and that the Court was informed that a retrial would raise questions of former jeopardy.

(4) The present opinion holds that the *McNabb* rule does not apply to exclude incriminating statements obtained by police from appellant on the first and last days of a two-

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afterwards on the count on which he was before convicted." 2 Cooley's Blackstone, 360, n. 15 (3rd Ed. 1884).

"In ascertaining the meaning of the phrase [twice in jeopardy] taken from the Bill of Rights it must be construed with reference to the common law from which it was taken." Kepner v. United States, 195 U.S. 100, 125-126, 24 S. Ct. 797 (1903).

and-a-half-day period between his arrest and his appearance before a committing magistrate. The opinion states simply that there was no confession and that appellant was taken before a committing magistrate as soon as he was released from the hopsital.

The Supreme Court has determined that exculpatory statements are no different from other admissions of incriminating facts. See *Opper* v. *United States*, 348 U. S. 84, 92, 75 S. Ct. 158, 163-164 (1954).

We submit that there is a distinction between a hospital and the "strong room" of a hospital in which prisoners are kept. (R. 279). Appellant was in police custody. The ward was locked and guarded by a police officer. At no time while appellant was being interrogated by police or fire department officers was he informed that he had the right to counsel and the right not to make statements which might later be used against him. The opinion indicates that the *McNabb* rule will be applied to protect those suspects in police custody who are well, but not those who are wounded. [714] Two judges of that division of this Court which heard Green's second appeal shortly afterwards, in *Tillotson* v. *United States*, No. 12,503 (Feb. 14, 1956), indicated that the *McNabb* rule will not be applied unless the accused has been coerced. In that case, an oral confession was obtained after a morning of questioning. The opinion suggests that only after an oral confession was obtained was accused informed that she did not have to make a statement, and that any statement might be used against her. The Court found that the accused had been neither coerced nor illegally detained. The vice condemned by the Supreme Court in *McNabb* v. *United States*, 318 U. S. 332, 63 S. Ct. 608 (1943), however, was not coercion, but resort by police to questioning persons in custody who are "without the aid of friends or the benefit of counsel." 318 U. S. at p. 345.

The present decision, read with that in the *Tillotson* case, opens up the opportunity for secret interrogation that the *McNabb* rule was intended to foreclose.

(5) Finally, in its concluding paragraph, the present opinion rejects as "insufficient" other reasons for reversal urged by Court-appointed counsel, among them forensic misconduct by the prosecution in the closing moments of the trial. We regard the District Attorney's references to

this Court's "responsibility to *sift the facts* and *look them over* and decide whether this man will go to the electric chair;" to the role of the Supreme Court which, "if they [715] see fit, . . . can *look these facts over* and decide if this man goes to the electric chair," and to the role of the President of the United States, "who may *look these facts over*" and might commute the sentence, and other like remarks, as substantially prejudicial to the rights of this elderly and rather pitiful defendant charged with the killing of his best friend.

For this Court to refrain from discussing these remarks cannot help but encourage future conduct of this sort by prosecuting attorneys.

Conclusion

WHEREFORE counsel for appellant pray that this Court *en banc* will rehear this case with oral argument.

Respectfully submitted,

GEORGE BLOW,
701 Union Trust Building,
Washington 5, D. C.
CHARLES E. FORD,
401 3rd Street, N. W.,
Washington 1, D. C.
GEORGE RUBLEE II,
701 Union Trust Building,
Washington 5, D. C.
Counsel for Appellant by
Court-appointment.

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[716] CERTIFICATE OF SERVICE (omitted in printing)

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[717] CERTIFICATE OF COUNSEL (omitted in printing)

[718] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,809

EVERETT D. GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

OPINION ON REHEARING EN BANC—Decided June 28, 1956

Messrs. George Blow and *George Rublee, II*, (both appointed by this Court), with whom *Mr. Charles E. Ford* (appointed by the District Court) was on the brief, for appellant.

Mr. Harold Greene, Assistant United States Attorney, for appellee. *Messrs. Leo A. Rover*, United States Attorney at the time brief was filed, and *Thomas A. Flannery* and *Lewis Carroll*, Assistant United States Attorneys, were on the brief for appellee. *Mr. Oliver Gasch*, United States Attorney, also entered an appearance for appellee.

Before EDGERTON, Chief Judge, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* This case is here for the second time. On the first appeal Green's conviction of second degree murder under the second count of an indictment, which count charged murder in the first degree done in the perpetration of arson,[1] was reversed. 95 U. S. App. [719] D. C. 45, 218 F. (2d) 856 (1955). Because "all the testimony as to what occurred in the burning house pointed to murder in the first degree and nothing else," this court held the trial judge erred in giving a second degree instruction. We were concerned, however, at the obvious risk Green was running in successfully appealing from the second degree murder conviction but were assured he was

[1] The first count charged arson only and will be noticed *infra*.

aware of it. With respect to this we said in the opinion, at page 48:

> ". . . In seeking a new trial at which—if the evidence is substantially as before—the jury will have no choice except to find him guilty of first degree murder or to acquit him, Green is manifestly taking a desperate chance. He may suffer the death penalty. At oral argument we inquired of his counsel whether Green clearly understood the possible consequence of success on this appeal, and were told the appellant, who is 64 years of age, says he prefers death to spending the rest of his life in prison. He is entitled to a new trial."

After remand, Green was tried again under the first degree murder charge. As the evidence was substantially the same as before, the trial judge of course did not instruct on second degree murder. This time the jury found him guilty of murder in the first degree, and he again appeals.

Counsel appointed to represent appellant have ably presented his case in briefs and in oral argument. They rely, first, on double jeopardy. Their theory is that when the jury at the first trial found Green guilty of murder in the second degree, it acquitted him of first degree murder; that he could not be tried again on a charge of which he had been acquitted, and his defense of former acquittal asserted at the second trial should have been sustained.

Where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial for the offense of which he was previously convicted. *United States* [720] v. *Ball*, 163 U. S. 662, 672 (1896); *Francis* v. *Resweber*, 329 U. S. 459, 462 (1947). This principal is not disputed by counsel. But the question here has an additional element and may be stated thus: Where one is convicted, not of the crime charged in the indictment under which he was tried but of a lesser included offense, and on his appeal the conviction is reversed and he is granted a new trial, may he be tried again for the crime charged in the indictment, or must the new trial be confined to the lesser offense of which he was first convicted?

This question was presented to the Supreme Court in *Trono* v. *United States*, 199 U. S. 521 (Dec. 4, 1905), a case

which arose in the Philippine Islands. Mr. Justice Peckham, who wrote the principal opinion, said, at page 530:

> "This question has given rise to much diversity of opinion in the various state courts. Many of them have held that the new trial must be confined to the lesser offense of which the accused had been convicted on the first trial, while other courts have held precisely the contrary, and that upon a new trial the whole case was open as if there had been no former trial. . . ."

After discussing some of the cases, Mr. Justice Peckham reached this conclusion, at pages 533-4:

> "In our opinion the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previousl, taken place. . . .
>
> ". . . When at his own request he has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case. . . ."

[721] Counsel for appellant say the Peckham *Trono* opinion is not that of the Supreme Court. They characterize it as "a four to four opinion, with Mr. Justice Holmes concurring only in the result reached by the first four . . ." Four justices did indeed dissent, and Mr. Justice Holmes was noted as "concurring in the result." The result flowed directly and solely from the Peckham conclusion that ". . . the better doctrine is that which does not limit the court or jury, upon a new trial, to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial . . ." If Mr. Justice Holmes had not thought that "the better doctrine," he could not have concurred in the result.

Moreover, some 18 months before the *Trono* decision, the distinguished Holmes had affirmatively asserted that to be

the better doctrine. Dissenting in *Kepner* v. *United States*, 195 U. S. 100, 134 (May 31, 1904), he said, at pages 135-6:

> "It might be said that when the prisoner takes exceptions he only is trying to get rid of a jeopardy that already exists—that so far as the verdict is in his favor, as when he is found guilty of manslaughter upon an indictment for murder, according to some decisions he will keep it and can be retried only for the less offense, so that the jeopardy only is continued to the extent that it already has been determined against him, and is continued with a chance of escape. I believe the decisions referred to to be wrong . . ."

We see no reason to suppose that 18 months later Mr. Justice Holmes had abandoned this view but nevertheless concurred in the *Trono* result which depended upon it.

So, whatever it was in the Peckham opinion with which the great justice did not agree, we are sure it was not Peckham's choice of "the better doctrine," a result in which he expressly concurred. Thus the Peckham holding which is applicable here must have been the holding of a majority of the Supreme Court. Probably that is why in the official [722] report it is said, at page 528, "Mr. Justice Peckham, after making the foregoing statement, delivered *the opinion of the court.*" [Emphasis supplied.] And why Mr. Justice Harlan, dissenting, referred, at page 536, to Peckham's opinion as "the opinion and judgment of the court . . ." And why in several subsequent citations the Supreme Court and lesser tribunals have so regarded it.[2]

Appellant's counsel insist the *Trono* decision set a precedent only for cases arising in the Philippines, and that it has no application here. They contend the Fifth Amendment's prohibition against double jeopardy did not extend to the Islands, and that therefore the *Trono* ruling has no application to continental cases involving the Amendment. This theory seems to us untenable. In the *Trono* case the Court was considering the effect of a Congressional enactment that in the Philippines "no person for the same offense shall be

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[2] E.g., *Burton* v. *United States*, 202 U. S. 344, 378 (1906); *Stroud* v. *United States*, 251 U. S. 15, 18 (1919); *Bryan* v. *United States*, 338 U. S. 552, 560 (1950); *Miller* v. *United States*, 224 F. (2d) 561, 562 (5th Cir. 1955).

twice put in jeopardy of punishment . . . ."[3] This is exactly the same as the double jeopardy provision of the Fifth Amendment, as the Court had held in the then recent case of *Kepner* v. *United States*, 195 U.S. 100 (1904).[4] Hence what the Court said in the *Trono* opinion with regard to the provision of the Philippine statute necessarily applied to the pertinent provision of the Fifth Amendment, which has identical significance. And Mr. Justice Holmes was of that opinion, for he said in his *Kepner* dissent, at page 134:

> [723] "'. . . The case is of great importance, not only in its immediate bearing upon the administration of justice in the Philippines, but, since the words used in the Act of Congress are also in the Constitution, even more because the decision necessarily will carry with it an interpretation of the latter instrument. . . .'"

Thus we see why the *Trono* opinion says, "We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country. . . ." 199 U. S. at 530.

Counsel say this statement is *dictum;* that it is not and should not be binding on a federal court. Whether so or not, the statement was a deliberate expression of opinion which we think we may not disregard; moreover, it is one with which we agree. The *Trono* opinion's choice of "the better doctrine" with respect to the double jeopardy question under discussion was a ruling on a right not only guaranteed by the Philippine statute but also by the Fifth Amendment. We see no reason why it should not have general application wherever the Constitution reaches. We conclude that the *Trono* case is authoritative and requires us to hold that Green was not subjected to double jeopardy when, upon remand, he was tried for murder in the first degree.

But the reliance of diligent counsel upon the defense of former jeopardy does not stop with the plea of *autrefois*

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[3] Section 5 of an Act of July 1, 1902, 32 STAT., c. 1369, 691, 692, which extended to the Philippine Islands certain of our Constitutional guaranties.

[4] See also *Gavieres* v. *United States*, 220 U. S. 338, 341 (1911).

acquit which we have discussed and rejected in the foregoing portion of this opinion. They point out that at the first trial he was convicted under the arson count and did not appeal. Since there was only one act of arson, counsel say, "An unappealed conviction of arson bars subsequent prosecution for felony murder[5] arising out of arson." [724] The contention is based on *State* v. *Cooper*, 1 Green 361, 25 Am. Dec. 490 (N.J. 1833), which is said to have "established" the proposition for which counsel argue.

We cannot accept the *Cooper* case as binding authority. In *Carter* v. *McClaughry*, 183 U. S. 365, 395 (1902), and in *Gavieres* v. *United States*, 220 U. S. 338, 342 (1911), the Supreme Court quoted with approval the following excerpt from *Morey* v. *Commonwealth*, 108 Mass. 433, in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

> "A conviction or acquitttal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

Again, in *Morgan* v. *Devine*, 237 U. S. 632, 641 (1915), the Supreme Court said:

> ". . . [T]his court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges

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[5] They use this term to denote the crime committed by him who kills another in the perpetration or attempted perpetration of one of those felonies enumerated in the statute, which makes such a killing murder in the first degree.

> relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. . . ."

Following this, the *Carter* and *Gavieres* opinions were cited with approval.

"Applying these principles," the Supreme Court said in the *Gavieres* case, 220 U. S. at 343, "it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment." [725] It is equally plain in the present case that evidence sufficient to convict Green of arson under the first count would not have convicted him of murder under the second, which required proof that the death of a human being was caused by arson. Hence, the conviction of arson did not preclude later prosecution for and conviction of murder committed in the perpetration of the arson.

Appellant's counsel invoke the *McNabb* rule[6] because certain statements Green made to police officers and a fire inspector while he was in a hospital and before he had been arraigned were used to contradict in some respects his testimony at the trial. There was no confession. We think it clear that the *McNabb* rule does not apply in this case but, as two of our dissenting colleagues think otherwise, we shall discuss the facts involved.

For some time prior to Tuesday, May 26, 1953, Miss Betty Brown, who was 83 years old and in ill health, had shared a house with and been cared for by the appellant. In response to an alarm, fire apparatus arrived at the house about 7:40 a. m. on that Tuesday. After breaking into the house, firemen not only discovered flames but also found Miss Brown dead in her bed, and found Green lying face down in a bathtub, suffering from superficial stab wounds on the upper part of his body and from inhalation of smoke.

After reviving Green with oxygen, the firemen removed him to Emergency Hospital, where he was received about 8:00 a. m. and was given medical attention. Police Sgt. Couture, who knew nothing about the facts except that

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[6] *McNabb* v. *United States*, 318 U. S. 332 (1943).

Green and Miss Brown's body had been found in the burning building, went to Emergency Hospital about 8:30 a. m. and asked him what had occurred. The officer later testified at the trial that Green, who was quite rational and "talked [726] good," told him he awoke about 7:00 a. m., smelled smoke, and went to the basement to investigate. There he was attacked, he said, by a tall, bald-headed colored man who stabbed him several times with a long dagger; that after a short interval of unconsciousness he (Green) dragged himself to the bathtub where the firemen found him.

Couture testified further that about 10:00 a. m. Tuesday he returned to Emergency Hospital accompanied by Sgt. Clark and again talked with Green. They asked him how he accounted for the fact that there were five separate fires, to which he replied that the colored man must have set them. Asked how the latter had escaped from the house that was so tightly closed the firemen had to break in, he offered no explanation. The officers had found pencils and an open box of stationery on a kitchen table; they asked Green if he had been writing letters, to which he replied he had not. Later that day, Tuesday, Green was taken in an ambulance from Emergency Hospital to District of Columbia General Hospital, where he was admitted at 2:10 p. m. and placed in a locked ward with about a dozen other patients. A policeman was on guard outside the door. About 3:00 p. m. Tuesday a fire inspector questioned Green, who told him substantially the same story he had recited to Sgts. Couture and Clark that morning at 10:00 o'clock. There was no further interrogation of the appellant on Tuesday, May 26, and none at all on Wednesday, May 27.

During the evening of Wednesday, May 27, a Mrs. Anthony, an acquaintance of Green, turned over to the police a letter from him which she had received in that day's mail, together with two $20.00 bills which had been enclosed with it. The envelope was postmarked Washington, D. C., May 26—12:30 p. m.—1953. The letter read:

> "Tuesday A. M. Please notify W. T. Thompson, Fredericksburg, Virginia, of Miss Betty Brown's death. [727] A fine and good lady, a true friend to me. We both want it this way. Good-bye, my friend. /s/ Everett.

"Please have my ashes thrown on the Chesapeake Bay. (Okay.) The inclosed is for flowers for her."

Because of the discovery of this letter, Sgts. Couture and Clark and the fire inspector returned to the General Hospital at 9:30 a. m., Thursday, May 28, and again interviewed Green. He readily admitted having written the letter to Mrs. Anthony, and explained it by saying he had gone to bed about midnight but was restless and at 12:30 a. m. (Tuesday, May 26) went to see how Miss Brown was. Finding she was dead, he contemplated suicide and wrote the letter to Mrs. Anthony, mailed it in a nearby box, and went to bed. He then repeated what he had previously said about going to the smoke-filled basement some hours later that morning and there meeting a colored man who attacked him. Shortly after this interview and at 11:00 a. m. Thursday, May 28, the medical authorities permitted the police to take Green from the hospital to the coroner, who conducted a preliminary examination and held him to await the action of the grand jury.

The statements attributed to Green by the police sergeants and the fire inspector in their testimony concerning the three interviews with him on Tuesday, and the fourth on Thursday morning, are those which appellant and two of our dissenting brothers say were received in violation of the *McNabb* rule. Green was not prejudiced by the admission of evidence concerning the Thursday morning statement in which he admitted writing the letter to Mrs. Anthony and explained it by saying it was written after he had discovered at 12:30 a. m. that Miss Brown was dead; for in his testimony at the trial he adhered to his Thursday morning statement.

This brings us to the three statements made by the appellant on Tuesday, the day of the fire. We observe that when [728] Green talked to Sgt. Couture at 8:30 that morning and to him and Sgt. Clark an hour and a half later, he had not been arrested, was not in the custody of the police, and was not under surveillance by them. He was in Emergency Hospital and there was no policeman there guarding him. It is thus apparent that, when the appellant made the two Tuesday morning statements, he not only was not being ille-

gally detained but was not being detained at all. As far as we can ascertain from the record, Green was not under police restraint until shortly before 2:00 o'clock Tuesday afternoon when he started the ambulance journey from Emergency to General, on which he was accompanied by a police officer and after which he was in the locked ward at General under police guard. In view of these facts, testimony concerning what Green said in the two Tuesday morning interviews, is not subject to attack under the *McNabb* rule.

The remaining statement, made to the fire inspector at 3:00 o'clock Tuesday afternoon, was made while Green was in custody. But, even if that custody were thought to be unlawful detention, evidence of his statement then made can scarcely be said to have prejudiced him; for the Tuesday afternoon statement was identical in all material respects with that appellant made that morning at 10:00 o'clock when he was not being detained, which was therefore unquestionably admissible.

Green testified he was not threatened or mistreated at any time by anybody, and made no claim that the statements he made in the four pre-arraignment interviews were induced by any form of coercion. His statements were not confessions. Evidence concerning them merely went to Green's credibility as a witness. There was no unlawful detention due to failure promptly to carry him before a committing magistrate. He was arraigned just as soon as the hospital authorities released him. Delay in arraigning a suspect caused by his necessary hospitalization can hardly be called illegal detention.

[729] Strong suspicion that Green had set the fires and that his wounds were self-inflicted with an ice pick to give credence to his story about a colored man attacking him with a "long dagger," arose from the fact that he was the only living person in the tightly closed house when the firemen arrived. But the police could hardly be expected to make a murder charge on that suspicion alone. It was not until Wednesday evening when they obtained the letter, written some hours before the death of Miss Brown,[7] that

[7] Uncontradicted medical testimony concerning the autopsy showed she died from inhaling hot irritating gases caused by the

a murder charge was justified. As the Supreme Court said in *United States* v. *Carignan*, 342 U. S. 36, 44-5 (1951), "This case falls outside the reason for the [*McNabb*] rule, *i.e.*, to abolish unlawful detention." We note also that the trial judge carefully charged the jury to disregard Green's pre-arraignment statements unless it believed to the exclusion of a reasonable doubt that they were voluntarily made.

Since there was neither coercion nor illegal detention, and no suggestion of inducement through promises, we hold that evidence of Green's pre-arraignment statements was properly received and that the *McNabb* rule does not apply.[8] [730] We have given careful consideration to the other reasons for reversal advanced by counsel but must reject them as insufficient. None appears to require discussion.

Affirmed.

PRETTYMAN, *Circuit Judge*, concurring: I concur in the opinion and judgment of the court but solely because of the opinion of the Supreme Court in the *Trono* case. I see no escape in this case from the law there laid down.

BAZELON, *Circuit Judge*, dissenting: Upon the ground stated in the opinion of Judge Fahy and upon the further ground stated below, I dissent from the judgment of the court.

Statements the police obtained by questioning appellant during the two days intervening between his arrest and his

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fire, which started about 7:00 a.m. Green claimed she was dead at 12:30 a.m. See *Green* v. *United States*, 95 U. S. App. D.C. 45, 218 F. (2d) 856 (1955), for a full statement of this testimony on this subject which was given at the first trial, and which was also given in practically the same form at the second trial with which we are now concerned.

[8] *Cf.* Judge Washington's concurring opinion in *Tillotson* v. *United States*, —— U.S. App. D.C. ——, 231 F. (2d) 736, 740 (1956), in the course of which he said:

> ". . . Clearly, lack of coercion alone—or lack of illegal detention alone—does not render a confession admissible. But where there is neither coercion nor illegal detention, and no suggestion of inducement through promises, the confession should be admitted. . . ."

arraignment were admitted in evidence against him.[1] Because appellant's injuries required his confinement in a hospital during this period, the majority holds there was no "illegal detention" within the meaning of Rule 5(a), F.R.CRIM.P., and hence the *McNabb* rule does not bar the statements. I cannot agree. I would hold the admission of the statements to be error warranting a new trial.[2]

[731] Rule 5, F. R. CRIM.P., requires arraignment "without unnecessary delay." " . . . what constitutes 'unnecessary delay,' *i.e.*, reasonable time within which the prisoner should be brought before a committing magistrate must be

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[1] Whether, prior to his transfer to the locked ward of the District of Columbia General Hospital, appellant had been placed under arrest or just happened to be fairly constantly attended by policemen and fire inspectors is not clear from the record. But from Tuesday afternoon to Thursday, he was under arrest and the statements here in question are those obtained from him during that period in interrogations by two policemen and two fire inspectors.

[2] That the appellant, in making the admissions in question neither intended nor purported to confess, does not prevent the application of the *McNabb* rule. The majority, indeed, although it notes that "there was no confession," finds *McNabb* inapplicable not on that account, but only because there was no "illegal detention." To the extent that Ercoli v. United States, 76 U.S.App.D.C. 360, 131 F.2d 354 (1942), dealing with the requirement of corroboration of extrajudicial admissions, is here relevant, it must be held to have been overruled in *Opper v. United States*, 348 U.S. 84 (1954). The Supreme Court pointed out that it is inconsequential whether the statements were made as a confession or for the purpose of exculpation, so long as they are "statements of the accused out of court that show essential elements of the crime . . ." *Id.* at 91. Regarding the contention of the Government (and our view in *Ercoli*) that admissions intended as exculpation should be excepted from the requirement of corroboration, the Court said: "This accords with Professor Wigmore's view [citing EVIDENCE (3d ed.) § 821; relied on by us in *Ercoli*, 76 U.S.App.D.C. at 362, 131 F.2d at 356, notes 6, 7 and 8]. The statements here are exculpatory. . . . There is no opinion of this Court declaring or declining such an exception. We conclude that exculpatory statements, however, may not differ from other admissions of incriminating facts. Given when the accused is under suspicion, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused." *Id.* at 91-92.

determined in the light of all the facts and circumstances of the case."[3] Reasonableness of a delay of arraignment is, [732] therefore, a functional consideration which embraces not only the circumstances occasioning the delay but also the events transpiring in the course of it.

The most obvious of the "evil implications of secret interrogation"[4] is that the accused may be unaware of such matters as his right to have counsel and to refuse to answer questions, and the risk that any statement he makes may be used against him. Hence Rule 5(a) directs that an arrested person be taken "without unnecessary delay before the nearest available" committing officer, who "shall inform" the accused, as required by Rule 5(b), of the aforementioned matters *inter alia*.

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[3] Notes of Advisory Committee, Rule 5(a). The Supreme Court, speaking of the statutory predecessors of Rule 5, said in McNabb v. United States, 318 U.S. 332, 343-44 (1943):

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. *It aims to avoid all the evil implications of secret interrogation of persons accused of crime.*" (Emphasis supplied.)

[4] *Supra* note 2.

The rule was promulgated because failure to arraign promptly "was thought to give opportunity for improper pressure by police before the accused had the benefit of the [733] statement by the commissioner."[5] Opportunity for such pressure is present whenever the arrested person "is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends."[6]

That the delay in arraigning appellant was unavoidable did not diminish the opportunity for pressure. The secrecy of appellant's interrogation—and hence its evil implications—could have been no greater if the delay had been deliberately planned by the police. Hence, if the evil implications of secret interrogation are to be avoided, in a case where delay of arraignment cannot be avoided, it is at least indispensable that the police give the accused substantially that advisory information which the committing officer would give him at the arraignment.[7] The practice of thus advising arrested persons has been prescribed by rule of court in England at least since 1912[8] and was used by "the respectable officer" in this country as long as half a century [734] ago.[9] That this is consistent with proper and efficient

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[5] United States v. Carignan, 342 U.S. 36, 45 (1951).

[6] Mr. Justice Douglas, concurring in United States v. Carignan, *id.* at 46. In Watson v. United States, — U.S.App.D.C. —, — F.2d — (No. 12673, decided May 3, 1956), the court had occasion to comment on the police practice of keeping a prisoner secreted from lawyers. See note 11 of my dissenting opinion in Mallory v. United States, — U.S.App.D.C. —, —, — F.2d —, — (No. 12915, decided this day).

[7] Cf. Pixley v. United States, 220 F.2d 912, 913 (10th Cir. 1955), holding a two-day delay of arraignment not improper where the accused was immediately warned that "he did not have to make a statement; that any statement he might make could be used against him; and that he was entitled to an attorney . . ."; also, Haines v. United States, 188 F.2d 546 (9th Cir. 1951), *cert. denied*, 342 U.S. 888 (1951), approving the admission in evidence of statements obtained through two interrogations, each of which was preceded by the equivalent of a Rule 5 advisory statement.

[8] McNabb v. United States, 318 U.S. at 345 n. 9, and authorities there cited; see also 3 WIGMORE, EVIDENCE (3d ed.) 294-98.

[9] Major Sylvester, Washington Chief of Police, President of International Association of Chiefs of Police, Proceedings of 17th Annual Meeting (1910) 54, quoted in 3 WIGMORE, EVIDENCE (3d ed.) 316, 317.

police work is clear from the statement of J. Edgar Hoover, Director of the Federal Bureau of Investigation, that:

> . . .. Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice.[10]

Since there is no showing here of any circumstances to mitigate the evils of appellant's secret interrogation, I would apply the salutary requirements of Rule 5 and hold that *McNabb* bars the statements made pursuant to police interrogations during the period of delay. "A statute [or a rule] carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application."[11]

It is said that the admission in evidence of the statements obtained through secret interrogation of the appellant resulted in no prejudice to him. Such a conclusion can be reached only when "the conviction is sure that the error did not influence the jury, or had but very slight effect . . . ." *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). Having no such sure conviction,[12] especially in the light of the

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[10] Hoover, *Civil Liberties and Law Enforcement*, 37 IOWA L.R. 175, 182 (1952).

[11] McNabb v. United States, 318 U.S. at 344.

[12] Sergeant Couture testified that appellant told him on Thursday that he had written and mailed the letter to Mrs. Anthony "just prior to his detecting the order of smoke." That time was fixed by all the evidence, including appellant's own testimony, at about 7:00 a.m. That statement vitally contradicts the story appellant told at the trial: that he had found Miss Brown dead at about 12:30 a.m.; that, in a fit of despondency he had immediately written the letter and mailed it before 1:00 a.m.; that then, deciding to wait until morning before calling anyone to take care of the body, he went back to bed; that when he arose at about 7:00 a.m., even before he was fully dressed, he detected smoke and, going to investigate, was attacked and knocked senseless. If the jury believed that appellant had gone out to mail a letter at 7:00 a.m., as Sergeant Couture said appellant had admitted, then appellant's whole story must, or could, have become incredible.

[735] fact that this is a capital case, I am unable to agree that the error was not prejudicial. Cf. *Anderson* v. *United States*, 318 U.S. 350, 356-57 (1943).

I am authorized to say that Edgerton, *Chief Judge*, joins in this dissent.

FAHY, *Circuit Judge*, dissenting: Green was first tried for arson and for murder in the first degree while committing arson. He was convicted of arson and of second degree murder. This result constituted an acquittal of first degree murder. *Trono* v. *United States*, 199 U.S. 521, 529-30, and see p. 538, dissenting opinion of Mr. Justice McKenna. He appealed only from the judgment of conviction of second degree murder.[1] *Green* v. *United States*, 95 U.S. App. D.C. 45, 46, 218 F.2d 856, 857. We there reversed that conviction. That appeal did not bring to this court his acquittal of first [736] degree murder.[2] Accordingly his appeal did not waive his constitutional right not to be placed in jeopardy a second time for first degree murder. U.S. Const. amend. VI. Therefore I think he could not be tried again for first degree murder. I do not think *Trono* v. *United States*, 199 U.S. 521, requires us to hold otherwise. For the *Trono* case arose in the Philippine Islands where Trono's conviction for a lesser offense than that for which he was indicted and first tried was appealed to the Supreme Court of the Philippines under procedures which permitted the whole case to be reviewed and tried *de novo* in the appellate court. *Trono* v. *United States*, *supra* at 534; *United States* v. *Berry*, 5 Phil. Rep. 409; *United States* v. *Clemente*, 24 Phil. Rep. 178; *cf. Kepner* v. *United States*, 195 U.S. 100; *United States* v. *Atienza*, 1 Phil. Rep. 736; *United States* v. *Abijan*, 1 Phil. Rep. 83; *United States* v. *Padilla*, 4 Phil. Rep. 511; *United States* v. *Flemister*, 4 Phil. Rep. 300, 5 Phil. Rep. 650; *United States* v. *Noriega*, 31 Phil. Rep. 310, 314; *United States* v. *Tamparona*, 31 Phil. Rep. 321, 328; *United States* v. *Gimenez*, 34 Phil.

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[1] His notice of appeal, apparently in his own handwriting, in terms applied to arson as well as second degree murder. But in presenting the case in this court both the United States and appellant represent that the appeal was only from that part of the judgment which covered the conviction of second degree murder.

[2] Nor, apparently, did it bring to this court his conviction of arson. See note 1 *supra*. Our prior decision, *Green* v. *United States*, *supra*, did not consider the arson conviction.

Rep. 74, 77. So that when Trono took his appeal, in his effort to obtain acquittal entirely, he waived his acquittal of the more serious offense. Therefore he could be again put in jeopardy with respect to it. No comparable situation governed Green's previous appeal, and I think we should apply the prevailing rule at common law which would have precluded his second trial for the greater offense of which he had been acquitted. See cases cited in *Trono* by Mr. Justice McKenna, 199 U.S. at 540 n.1. It is true that in *Trono* the opinion of Mr. Justice Peckham, for himself and for Mr. Justice Brewer, Mr. Justice Brown and Mr. Justice Day went further, and its language if applied to Green's case would require a conclusion contrary to that I state; but since [737] that opinion did not have the adherence of a majority of the Court, and since also the situation in the Philippines differed materially from that here, I believe with all deference that we are free to apply to Green's case principles which do not accord with all that is said in Mr. Justice Peckham's opinion in *Trono*.

I am authorized to say that Chief Judge Edgerton and Circuit Judge Bazelon join in this dissent.

[738] [Filed endorsement omitted].

In United States Court of Appeals for the District of Columbia Circuit

No. 12,809

Criminal 1083-53

EVERETT D. GREEN, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Rehearing En Banc.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges.

JUDGMENT—June 28, 1956

This cause came on to be reheard before the Court en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, it is ordered and adjudged by this Court en banc that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Wilbur K. Miller.

Dated: June 28, 1956.

Circuit Judge Prettyman concurs in the opinion and judgment of the Court solely because of the opinion of the Supreme Court in the *Trono* case.

Separate dissenting opinion by Circuit Judge Bazelon, in which Chief Judge Edgerton joins.

Separate dissenting opinion by Circuit Judge Fahy, in which Chief Judge Edgerton and Circuit Judge Bazelon join.

[739] United States Court of Appeals for the District of Columbia Circuit

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Clerk's certificate to foregoing transcript omitted in printing.

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[740] Supreme Court of the United States, October Term, 1956

No. 172 Misc.

EVERETT D. GREEN, Petitioner,

vs.

UNITED STATES OF AMERICA

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit.

ORDER ALLOWING CERTIORARI—November 19, 1956

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 589.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.